

NO. 49395-1

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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EMERALD ENTERPRISES, LLC and JOHN M. LARSON,  
Appellants,

v.

CLARK COUNTY,  
Respondent,

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**BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

In 2012, Washington citizens approved Initiative Measure No. 502 (“I-502”) and legalized recreational marijuana. I-502 does more than create a narrow defense to marijuana use and possession. It provides a statutory right to obtain marijuana legally through large-scale commercial production, processing, and retail operations. The law requires the “provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market.” These provisions are intended to be applied uniformly throughout the state.

In May 2014, the Clark County enacted CCC 40.260.115(B)(4) banning all marijuana related land uses in unincorporated areas of the county.

Under Washington’s Constitution, local jurisdictions may not enact local ordinances that conflict with state law. I- 502 retail license holder Emerald Enterprises filed suit in Clark County Superior Court challenging the County’s ban on the grounds that it irreconcilably conflicted with I-502. On August 23, 2016, the superior court found that CCC 40.260.115(B)(4) was neither

preempted by nor unconstitutionally conflicted with state law.

Emerald's appeal follows.

## **II. ASSIGNMENTS OF ERROR**

**Assignment of Error 1:** The trial court erred in finding that CCC 40.260.115(B)(4) does not irreconcilably conflict with state law.

**Issue 1:** Under article XI, § 11 of the Washington State Constitution, a jurisdiction may only make and enforce ordinances that do not conflict with general laws. An ordinance conflicts with general laws if it prohibits that which a statute permits. I-502 legalizes the production and retail sale of marijuana for adults. CCC 40.260.115(B)(4) prohibits the production and retail sale of Marijuana and subjects I-502 businesses to civil and criminal penalties. Does CCC 40.260.115(B)(4) irreconcilably conflict with state law?

**Issue 2:** An ordinance also irreconcilably conflicts with state law if it thwarts the legislature's purpose. I-502 creates a tightly regulated, statewide marijuana distribution system with the goals of (1) allowing law enforcement to focus on violent and property crimes; (2) generating new state and local tax revenue; and (3) taking marijuana out of the hands of illegal drug organizations throughout the State. CCC 40.260.115(B)(4) prohibits I-502 licensed marijuana sales thus undermining the statewide regulatory scheme. Does CCC 40.260.115(B)(4) irreconcilably conflict with state law?

**Issue 3:** An ordinance conflicts with state law if it provides for an exercise of power that the statutory scheme did not confer to local governments. I-502 granted the authority of siting retail outlets to the WSLCB. Further, I-502 contains no opt-out provisions for local government. In banning marijuana businesses under CCC 40.260.115(B)(4), the County has usurped the will of the voters and the authority of WSLCB. In creating a ban in the absence of statutory authority, does CCC 40.260.115(B)(4) irreconcilably conflict with state law?

**Issue 4:** Preemption occurs when the Legislature states its intention either expressly or by necessary implication to preempt a

regulatory field. Under RCW 69.50.608, the state of Washington fully occupies and preempts the entire field of setting penalties for violations of the Washington Uniform Controlled Substances Act ("USCA"). Counties may enact only those laws and ordinances relating to controlled substances that are consistent with Chapter 69.50 RCW and local laws and ordinances that are inconsistent with the requirements of State law are preempted and repealed. CCC 40.260.115(B)(4) is inconsistent with the USCA in that it prohibits the operation of businesses expressly authorized by RCW 69.50.325. Is CCC 40.260.115(B)(4) preempted by state law?

### **III. STATEMENT OF THE CASE**

#### **A. Voters Approve I-502 to Bring Washington's Marijuana Market Under Strict Regulatory Control.**

On November 6, 2012, Washington citizens approved Initiative Measure No. 502 ("I-502"), a state law creating a robust regulatory system legalizing the production and sale of marijuana for private, recreational use. Laws of 2013, c 3 § 1. The citizens intended that Washington stop treating marijuana use as a crime. *Id.* Under I-502, Washington's prior prohibition scheme was replaced with a tightly regulated, state-licensed system similar to that for controlling hard alcohol. *Id.* I-502 decriminalizes the use and possession of marijuana with the goals of (1) allowing law enforcement resources to be focused on violent and property crimes; (2) generating new state and local tax revenue for education, health care, substance abuse prevention; and (3) taking marijuana out of the hands of illegal drug organizations. *Id.*

**B. I-502 Replaces Black Market Production and Distribution of Marijuana in Washington with a Tightly Regulated Statewide System Administered by the WSLCB.**

All regulatory authority under I-502 is vested with the Washington State Liquor and Cannabis Board (“WSLCB”). RCW 69.50.345. I-502 requires WSLCB to establish and implement procedures and regulations for the licensing of marijuana producers, processors, and retailers. *Id.* The rules implemented by the board cover all aspects of marijuana production and sale: regulation of equipment, record keeping, methods of production, processing and packaging, security, employees, retail locations, and labeling. *Id.* see *also* RCW 69.50.342. Further, WSLCB has promulgated extensive rules establishing requirements for licensees including (1) minimum residency requirements, (2) age restrictions, (3) background checks for licensees and employees, (4) signage and advertising limitations, (5) requirements for insurance, recordkeeping, reporting, and taxes, (6) and detailed operating plans for security, traceability, employee qualifications, and destruction of waste. See Chapter 314-55 WAC generally.

The WSLCB is charged with siting retail outlets throughout the State by taking into consideration (a) population distribution, (b) security and safety issues, and (c) the provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market. RCW 69.50.345(2); 69.50.354. WSLCB regulations acknowledge that I-502 businesses must comply with local rules that apply to retail businesses in general, building and fire codes, and zoning ordinances. WAC 314-55-020(11). However, nothing in I-502, the statutes codifying it, or the regulations promulgated by WSLCB expressly state that a city or a county may ban I-502 businesses from their jurisdiction.

**C. WSLCB is Charged with Determining Where Retail Outlets Shall be Located.**

In October 2013, the WSLCB promulgated rules setting forth the application requirements for a marijuana retailer license and the method by which retail locations will be apportioned throughout the state. Per regulation,

The number of retail locations will be determined using a method that distributes the number of locations proportionate to the most populous cities within each county. Locations not assigned to a specific city will be at large. *At large locations can be used for unincorporated areas in the county or in*

*cities within the county that have no retail licenses designated.* Once the number of locations per city and at large have been identified, the eligible applicants will be selected by lottery in the event the number of applications exceeds the allotted amount for the cities and county.

WAC 314-55-081(1) (emphasis added). Following these guidelines, WSLCB awarded Emerald a retail license authorizing it to operate a retail marijuana outlet in Clark County on September 8, 2014. CP 24.

**D. Clark County Enacts CCC 40.260.115(B)(4) and Bans I-502 Businesses.**

In May 2014, the County passed Ordinance No. 2014-05-07 (codified at CCC 40.260.115) implementing an outright ban on the production, processing, and retail sales of marijuana within its jurisdiction. CCC 40.260.115(B)(4) has the effect of nullifying any retail license issued by the WSLCB that authorizes the holder to operate a marijuana retail outlet within the boundaries of unincorporated Clark County.

**E. Emerald Challenges CCC 40.260.115(B)(4) and the Clark County Superior Court Upholds the Ordinance as Constitutional Despite its Prohibiting what is Permitted by State Law.**

On December 23, 2015, Emerald (under trade name Sticky's) began offering WSLCB licensed marijuana for sale to the

public in Clark County. CP 25. On January 11, 2016, the County issued Notice and Order CDE2016-Z-001 ordering Emerald to cease all sales of marijuana. CP 19. Emerald appealed the Notice and Order to the County's Hearing Examiner. CP 108. The Hearing Examiner Denied Emerald's appeal and upheld the Notices. CP 22.

Emerald sought review of the Hearing Examiner's decision in the Clark County Superior Court on June 20, 2016 by LUPA petition. CP 108. On August 23, 2016, the superior court affirmed the Hearing Examiner finding that CCC 40.260.115(B)(4) was neither preempted by nor unconstitutionally conflicted with state law. CP 268-270.

#### **IV. ARGUMENT**

CCC 40.260.115(B)(4) violates article XI, § 11 of the state Constitution because the ordinance irreconcilably conflicts with I-502. An ordinance conflicts with a state law if the state law “preempts the field, leaving no room for concurrent jurisdiction,’ or ‘if a conflict exists such that the two cannot be harmonized.” *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998) (quoting *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 561, 807 P.2d 353 (1991)). Where an ordinance conflicts with a statute, the ordinance is invalid. *Parkland Light & Water Co. v. Tacoma*—

*Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004). A conflict arises when the two provisions are contradictory and cannot coexist. *Id.* at 434. I-502's requirement of the provision of adequate access to licensed sources of marijuana is wholly contradictory to the ordinance's outright ban.

In determining whether an ordinance is in 'conflict' with general laws the test is,

whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa. Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits.

*Weden*, 135 Wn.2d at 693 (quoting *City of Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292, (1960) (internal citations omitted)). Unconstitutional conflict can also be found where an ordinance thwarts the legislature's purpose. *Dep't of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 337 P.3d 364 (2014) (quoting *Diamond Parking, Inc. v. City of Seattle*, 78 Wn.2d 778, 781, 479 P.2d 47 (1971)). Finally, an ordinance conflicts with state law where a municipality exercises power that the relevant state law did not confer to the local government. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 699, 169 P.3d 14, 169 P.3d 14 (2007).

The superior court erred in finding no conflict exists between CCC 40.260.115(B)(4) and the laws codified under I-502. First, CCC 40.260.115(B)(4) conflicts with I-502 because it expressly prohibits business activity that is permitted under state law. Second, CCC 40.260.115(B)(4) conflicts because local bans thwart the legislative purpose of providing statewide access and uniform regulation of marijuana. Next, CCC 40.260.115(B)(4) is invalid because the ordinance places power into the hands of local government that the legislature conferred upon WSLCB. Finally, CCC 40.260.115(B)(4) is statutorily preempted by Washington law. The Court should hold the trial court erred.

**A. Standard of Review**

LUPA governs judicial review of land use decisions. Under LUPA, the Court “stands in the shoes of the superior court and reviews the hearing examiner’s action on the basis of the administrative record.” *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 525, 94 P.3d 366 (2004). A court may grant relief on a land use decision where the party seeking relief establishes that the land use decision violates the constitutional rights of the party seeking relief. RCW 36.70C.130(1)(f). The standard set forth at RCW 36.70C.130(1)(f) presents a question of law the Court reviews *de*

*novo. HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003).

Here, the issue before the Court is whether CCC 40.260.115(B)(4) ordinance violates article XI, § 11 of the Washington Constitution. Whether an ordinance conflicts with a general law for purposes of article XI, § 11 is purely a question of law subject to de novo review. *Weden*, 135 Wn.2d at 693 (citing *City of Seattle v. Williams*, 128 Wn.2d 341, 346–47, 908 P.2d 359 (1995)).

**B. CCC 40.260.115(B)(4) Irreconcilably Conflicts with State Law Because the Ordinance Prohibits What State Law Permits.**

An ordinance conflicts with state law if it permits what state law forbids or forbids what state law permits. *Parkland Light & Water Co. v. Tacoma–Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004). The focus of the inquiry is on the substantive conduct proscribed by the two laws. *State v. Kirwin*, 165 Wn.2d 818, 826, 203 P.3d 1044, 1048 (2009). A conflict arises when the two provisions are contradictory and cannot coexist. *Parkland Light*, 151 Wn.2d at 433. If an ordinance conflicts with a statute, the ordinance is invalid. *Id.* at 434.

Here, CCC 40.260.115(B)(4) is wholly contradictory to the

statutes providing for the production and retail sale of marijuana under I-502. The *substantive* conduct proscribed by CCC 40.260.115(B)(4) is patently at odds with State law authorizing marijuana uses. Therefore, the ordinance is invalid.

**a. By Prohibiting what I-502 allows, CCC 40.260.115(B)(4) Conflicts with State Law**

The Court found impermissible conflict in *Parkland Light & Water Co. v. Tacoma–Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004). *Parkland Light* involved a dispute over a Tacoma–Pierce County Board of Health’s resolution requiring municipal water districts to fluoridate their water. The Court held that the resolution conflicted with a statute which gave water districts the power to control the content of their water systems and, with that power, the authority to fluoridate their water. *Id.* at 434. The Court took great exception to the fact that the resolution deprived the water districts the specific statutory power and discretion provided by the Legislature. *Id.* Similarly, the Ordinance here divests the WSLCB of its statutory grant of authority to regulate the siting of marijuana production and retail. As in *Parkland Light*, CCC 40.260.115(B)(4) must fail in its entirety because of this conflict.

In *Entertainment Indus. Coal. v. Tacoma-Pierce County Board of Health*, 153 Wn.2d 657, 105 P.3d 985 (2005), businesses filed an action challenging a county resolution banning smoking in all public establishments. The Court held that the Health Board resolution irreconcilably conflicted with specific state statutory provisions which allowed smoking areas to be designated in a public place by the owner of an establishment. *Id.* at 664. The resolution, by imposing a complete smoking ban, prohibited what was permitted by state law. The Court found this conflict irreconcilable and concluded that “[b]y prohibiting what the statute allows, the Health Board’s resolution is invalid.” *Id.* Similarly, CCC 40.260.115(B)(4) cannot stand.

**b. The Scope and Reach of I-502’s Regulatory Scheme Distinguish this Case from *Lawson* and *Weden***

Emerald anticipates the County will rely on *Lawson v. City of Pasco*, 168 Wn.2d 675, 230 P.3d 1038 (2010) and *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998) in support of CCC 40.260.115(B)(4). Those cases are distinguishable.

In *Lawson*, the Petitioner owned and operated a mobile home park in Pasco, Washington and challenged a local ordinance which prohibited recreational vehicle sites for occupancy purposes

in any residential (RV) park. *Lawson*, 168 Wn.2d at 677. Lawson argued that the challenged ordinance conflicted with the Washington State Mobile Home Leasing and Tenancy Act (“MHLTA”). However, the Court determined the MHLTA was intended only to “regulate and determine legal rights, remedies, and obligations arising from any rental agreement between a landlord and a tenant regarding a mobile home lot . . .” *Id.* at 683. Based on the purpose of the Act, the Court concluded that the statute neither forbade recreational vehicles from being placed in the lots, nor did it create a right enabling their placement. *Id.* Instead, the statute simply regulated the landlord-tenant relationship once that relationship was established.

The *Lawson* analysis is distinguishable. The statutory structure at issue here extends much further than in *Lawson*. I-502 provides a comprehensive and pervasive regulatory scheme to establish statewide production and distribution of recreational marijuana. I-502 is intended to decriminalize the use and possession of marijuana, allow law enforcement resources to be focused on violent and property crimes, generate new state and local tax revenue, fight drug cartels, and create tightly regulated, state-licensed access to recreational marijuana. Alternatively, the

MHLTA at issue in *Lawson* is merely a framework to adjudicate disputes arising between a landlord and a tenant regarding a mobile home. Because the scope of these two acts so vastly differs, an analogy between *Lawson* and the present case cannot be drawn.

Similarly, the County's anticipated reliance on *Weden* is inappropriate. In *Weden*, the Court confronted an ordinance in which the use of motorized personal watercraft ("PWC") was banned in San Juan County. In analyzing the conflict, the Court focused on RCW 88.02.120, which provides "no person may own or operate any vessel on the waters of this state unless the vessel has been registered and displays a registration number and a valid decal in accordance with this chapter . . . ." *Weden*, 135 Wn.2d at 695. The Court however found no conflict because RCW 88.02.120, granted no affirmative rights and simply served as "precondition to operating a boat." *Id.* This reasoning does not analogize to the instant case.

The statute in *Weden* is limited in its application as it simply provides a registration requirement. I-502 authorizes and requires significantly more. As stated above, the statutory system set forth under I-502 provides a comprehensive licensing and regulatory

scheme. The initiative identifies significant and important policies with regard to the purposes and goals of the statutory scheme.

The applicable statutes here contain specific language directing the establishment of marijuana retail outlets. Under RCW 69.50.345, the state liquor control board must determine the number of retail outlets that may be licensed in each county, taking into consideration (a) population distribution; (2) security and safety issues; and (3) the provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market. The legislature makes it clear that there must be a sufficient number of retail establishments to ensure adequate access to Washington residents. This regulatory scheme cannot be reduced to a mere “precondition” registration requirement in *Weden*.

I-502 represents the will of the voters of Washington State that they be provided adequate access to legal and regulated marijuana. This marijuana regulatory scheme is not merely a “precondition” to operating a marijuana business as was the Court’s reasoning in *Weden*. Nor is the recreational marijuana scheme simply a means to determine legal rights arising from mobile home rental agreements as in *Lawson*. The provisions of RCW 69.50

pertaining to recreational marijuana form a pervasively regulated system to regulate every aspect of the production, distribution, and sale of legal marijuana in Washington State. The authority relied on by the County does not provide a basis by which a Court could reconcile the will of the people as expressed in I-502 and ordinances such as CCC 40.260.115(B)(4) which ban recreational marijuana on an ad hoc basis.

**c. While Local Jurisdictions Maintain Reasonable Regulatory Authority, the County Does not have the Authority to Ban State Licensed Marijuana Businesses.**

The legislature directed WSLCB to create a comprehensive regulatory scheme to manage every aspect of recreational marijuana production, processing, and sale. See RCW 69.50.342; 69.50.345. Under the regulatory scheme, WSLCB may issue licenses for retail outlets, provided the applicant for the permit meets certain standards. RCW 69.50.354. WSLCB has the authority to determine the location of retail outlets. RCW 69.50.342.

WSLCB regulations acknowledge that I-502 businesses must comply with local rules that apply to retail businesses in general, such as building and fire codes, and zoning ordinances. WAC 314-55-020(11). However, nothing in I-502, the statutes

codifying it, or the regulations promulgated by WSLCB expressly state that a city or a county may ban I-502 businesses from their jurisdiction.

This Division recently addressed a statutorily identical scenario. In *Dep't of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 337 P.3d 364 (2014), the Court invalidated a county ordinance which banned the application of biosolids within its borders under article XI, § 11 analysis. At issue in *Wahkiakum* was RCW 70.95J which established a comprehensive biosolids recycling program in Washington. *Id.* at 373. The legislature designated the Department of Ecology as the body responsible for implementing and managing the biosolids program. *Id.* Much like I-502, the state biosolid program in *Wahkiakum* was stringent and intended to be applied uniformly throughout the state. And like the case at bar, Wahkiakum County sought to ban what the state had authorized.

In invalidating Wahkiakum County's biosolid ban, this Court focused on the breadth of the regulatory scheme and the fact that the legislature had granted the Department of Ecology authority to regulate the biosolids program. In addressing the irreconcilable conflict, the court stated,

Even if the County had authority to more strictly regulate land application of biosolids, it does not have the authority to entirely prohibit the land application of class B biosolids when such application is allowed under a comprehensive regulatory scheme that has been enacted in accordance with legislative directive.

*Id.* at 376. The same is true here.

Marijuana retail outlets are authorized under I-502's comprehensive regulatory scheme. The WSLCB is vested with the authority to administer the regulatory scheme, determine where outlets would be sited, and grant licenses. As did the Wahkiakum County ordinance, CCC 40.260.115(B)(4) conflicts with state law by entirely prohibiting what is allowed under a comprehensive state regulatory scheme.

- i. The authority to enact reasonable regulations does not equal the authority to exclude a lawful land use.

Constitutionally, cities may enact reasonably regulate activities that are authorized by state law within their borders but, they may not prohibit same outright. In *Second Amendment Found. v. City of Renton*, 35 Wn.App. 583, 668 P.2d 596 (1983), the City of Renton prohibited by ordinance the possession of handguns in taverns and bars. A group of handgun owners challenged the ordinance on the basis that it unconstitutionally conflicted with Chapter 9.41 RCW, the state law governing the

licensing of concealed pistols. *Id.* at 585. Citing *Schampera*, the court found that because chapter 9.41 RCW did not license one to be in possession of a firearm at any time or place, the Renton ordinance did not contradict the statute. *Id.* at 588-89. Because the ordinance simply went farther in its prohibition of firearm possession, conflict did not exist.

The court defined the city's authority under these circumstances,

While an absolute and unqualified local prohibition against possession of a pistol by the holder of a state permit would conflict with state law, an ordinance which is a limited prohibition reasonably related to particular places and necessary to protect the public safety, health, morals and general welfare is not preempted by state statute.

*Id.* at 589. See also *Yarrow First Assocs. v. Town of Clyde Hill*, 66 Wn.2d 371, 376, 403 P.2d 49 (1965) ("the power to regulate streets is not the power to prohibit their use"). Thus, the authority to ban something permitted under state law does not constitutionally follow on the heels of a city's authority to regulate.

Indeed, Washington's attorney general acknowledged the same distinction. In an opinion addressing the constitutionality of ordinances which ban firearms in bars, our attorney general recognized,

[the] distinction between the validity of (a) an absolute, unqualified, local prohibition against possession of a concealed handgun by the holder of a state concealed weapon permit-at any time or place-and (b) a limited prohibition related only to particular times and places. The former is invalid under state law but the latter is not.

14 Op. Att'y Gen. 8 (1982); See *Weden v. San Juan Cnty.*, 135 Wn. 2d 678, 721, 958 P.2d 273 n.7 (1998) (Saunders, J dissenting). Constitutionally, a County's regulatory authority has limits.

The rule was also recognized in *Wahkiakum County* in addressing the reach of the county's authority to regulate biosolids,

[t]hus, the County may regulate biosolids if necessary to comply with other applicable laws. However, the County does not have the authority to completely ban the land application of all class B biosolids when that ban conflicts with state law.

184 Wn.App. at 385. The distinction between authority to regulate and authority to exclude is well settled. While the County's police power is expansive, it is not limitless. CCC 40.260.115(B)(4) over reaches and must be held unconstitutional.

## ii. Exclusionary Zoning is Unconstitutional

The distinction between regulatory authority and authority to ban an activity is further clarified in the context of zoning regulation. The County will likely suggest that WAC 314-55-020 (11) expressly grants cities and counties the authority to exclude I-502 businesses

from their jurisdictions. However, this reliance is misplaced. While WAC 314-55-020 (11) requires regulatory compliance from I-502 business owners, the regulation is not permission to municipalities to unlawfully or unconstitutionally exclude through zoning state permitted businesses.

Zoning ordinances will typically be found invalid and unreasonable where the zoning ordinance attempts to exclude or prohibit existing and established uses or businesses that are not nuisances. 8 McQuillin Mun. Corp. § 25:5 (3d ed.). Express delegations of power to prohibit an otherwise lawful use are rare, and usually are limited to specific uses which are regarded as singularly harmful. 1 Am. Law. Zoning § 9:16 (5th ed.). Exclusionary zoning ordinances are an unreasonable exercise of police power. See *Norco Const., Inc. v. King Cnty.*, 97 Wn. 2d 680, 685, 649 P.2d 103, 106 (1982). Common subjects of these exclusionary ordinances are junkyards, dumps, outdoor movies, motels, and mobile home parks. Generally, municipal efforts to totally exclude these uses from a community have been found unconstitutional.

The Court dealt with this issue in the context of mobile homes in *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 586

P.2d 860 (1978). There, a family challenged the revocation of a permit to place a mobile home in a residential district. The relevant ordinance provided however that mobile homes may only be cited in a designated “duplex and trailer” district. *Id.* at 24. The Court found the city’s ordinance constitutional in reliance primarily on the notion that the ordinance provided an adequate area within the city for mobile homes.

In sum, it is generally recognized that where a municipality provides an adequate area for mobile home development, as was done in the instant case, mobile homes may be excluded from conventional residential districts. As we have said, a municipality may exclude them from conventional residential districts because as a nonconventional use they tend to lower, adversely affect, or at least stunt the growth potential of the surrounding land.

*Duckworth v. City of Bonney Lake*, 91 Wn. 2d 19, 31, 586 P.2d 860, 868 (1978). Conversely, were an ordinance completely excludes a use, it will generally be deemed unconstitutional.

While *Duckworth* did not expressly address complete exclusion of mobile homes, the issue has been addressed in other jurisdictions. The courts of most jurisdictions are not favorably disposed toward zoning regulations which exclude otherwise legal uses from all of the territory of a municipality. 3 Am. Law. Zoning § 20:4 (5th ed.). A zoning ordinance which totally excludes legitimate

uses or fails to provide for such uses anywhere within the municipality should be regarded with particular circumspection and in fact must bear a more substantial relationship to the public health, safety, morals and general welfare of the community than an ordinance which merely confines that use to certain area in the municipality. *Hodge v. Zoning Hearing Bd. of West Bradford Tp.*, 11 Pa. Commw. 311, 312 A.2d 813 (1973). In evaluating the validity of exclusionary ordinances, the courts shift the burden of proof to the municipality to demonstrate that the ordinance promotes the public health, safety, and welfare. *See Appeal of Shore*, 524 Pa. 436, 573 A.2d 1011 (1990) (invalidating an ordinance which totally excluded mobile homes from a municipality, where there was no evidence to support justification of such exclusion). The same scrutiny would apply to exclusionary zoning of I-502 uses.

A similar analysis was applied by this Court in *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. Wenatchee*, 50 Wn.2d 378, 381, 312 P.2d 195 (1957). In determining that a zoning ordinance cannot wholly exclude churches from residential districts, the Court examined the case law from numerous jurisdictions and held,

[g]enerally, zoning ordinances which wholly exclude churches in residential districts have been held to be unconstitutional. Apparently, such provisions have not survived court review for the generally-stated reason that an absolute prohibition bears no substantial relation to the public health, safety, morals, or general welfare of the community.

*Congregation of Jehovah's Witnesses*, 50 Wn. 2d at 381. Without doubt, the building at issue in *Congregation of Jehovah's Witnesses* was subject to Wenatchee's reasonable zoning and building safety requirements, as would any other business or home. However, as *Congregation* makes clear, a jurisdiction's authority to enforce reasonable zoning ordinances does not equate to the power to exclude.

Cases dealing with the zoning of alcohol sales are helpful by analogy. In a minority of jurisdictions, state liquor laws are held to preempt local zoning laws that attempt to regulate the locations of places selling alcoholic beverages. 3 Am. Law. Zoning § 18:52 (5th ed.). Other states permit local governments to zone with respect to alcohol sales, either expressly or through case law. *Id.*

An illustrative example is found in *Westlake v. Mascot Petroleum Co.*, 61 Ohio St. 3d 161, 164, 573 N.E.2d 1068, 1071 (1991) holding modified by *Ohioans for Fair Representation, Inc. v. Taft*, 1993-Ohio-218, 67 Ohio St. 3d 180, 616 N.E.2d 905. There,

Ohio's Supreme Court addressed the respective authority of municipalities and the state to regulate liquor sales under Section 3, Article XVIII of the Ohio Constitution, a provision analogous to Washington's article XI, § 11.<sup>1</sup> Also, at issue in *Westlake*, was a provision of the Ohio liquor control regulation which acknowledged that applicants were required to meet local "building, safety, or health requirements" similar to WAC 355-15-020 (11). *Id.* at 166. On review of the legislative intent of the relevant statutes, the Court found the primary authority to regulate the sale of alcoholic beverages is delegated to the Department of Liquor Control, and that the legislative or executive authority of a political subdivision has only such rights or powers with regard to these sales as are expressly granted under the relevant liquor statutes. *Id.* at 167. The Court held a municipality is without authority to extinguish privileges arising under a valid Ohio Liquor Control permit through the enforcement of zoning regulations. Similarly, the County's ordinance must fail.

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<sup>1</sup> Ohio Constitution Section 3, Article XVIII provides that the authority of municipalities is limited to local police, sanitary and similar regulations not in conflict with state law.

**C. CCC 40.260.115(B)(4) Irreconcilably Conflicts with State Law Because the Ordinance Thwarts the Legislature’s Purpose and the Will of the Voters**

I-502 approaches the regulation and distribution of marijuana in the context of a statewide, general concern. I-502 authorizes the state liquor control board to regulate and tax marijuana for persons twenty-one years of age and older and creates statewide DUI laws to combat driving under the influence of marijuana. I-502 was enacted to generate new state and local tax revenue for education, health care, research, and substance abuse prevention. Moreover, the law was enacted to take “marijuana out of the hands of illegal drug organizations and bring it under a tightly regulated, state-licensed system similar to that for controlling hard alcohol.”

The statutory scheme established under I-502 demonstrates a clear legislative directive that distribution of marijuana is of statewide concern. A local municipality usurping the authority of the state on an issue of statewide importance is not permissible under article XI, § 11. *Weden*, 135 Wn.2d at 705. CCC 40.260.115(B)(4) (and others like it) render state regulations meaningless.

Finding CCC 40.260.115(B)(4) constitutional thwarts the legislature’s purpose by allowing any local government in the state to ban the production and sale of legal marijuana. Such local bans

would eviscerate the statewide regulatory scheme. The *Wahkiakum* court specifically recognized this in its holding,

[t]he County responds that Ecology's argument must fail because Ecology cannot show that all counties would ban the land application. But, the County fails to recognize the salient point in Ecology's argument—if all counties had the power to determine whether to ban land application of class B biosolids, then the entire statutory and regulatory scheme enacted to maximize the safe land application of biosolids would be rendered meaningless. The County's ordinance thwarts the legislature's purpose by usurping state law and replacing it with local law. Therefore, we hold that the County's ordinance is unconstitutional under article XI, § 11.

*Wahkiakum County*, 184 Wn. App. at 378 (internal citations omitted). The same rationale must prevail here. The Court should not allow I-502 to be gutted by local bans.

Similarly, in *Diamond Parking, Inc. v. City of Seattle*, the Court held that a City of Seattle ordinance prohibiting the transfer of licenses irreconcilably conflicted with state law allowing the rights of one corporation to transfer to another corporation upon merger. 78 Wn.2d 778, 781, 479 P.2d 47 (1971) The court reasoned that the state had created a comprehensive statutory scheme governing corporations and the City could not prohibit what state corporate law expressly allowed. *Id.* at 781–82. The Court's holding was explicit,

[w]e are of the opinion that the conflict here is irreconcilable. If the ordinance is given the effect for which the appellant contends, the legislative purpose is necessarily thwarted.

*Id.* at 781. The same rationale must be applied here. If cities and counties throughout the state are able to sidestep the requirements of I-502, the will of the people and the directive of the legislature are without effect.

**D. CCC 40.260.115(B)(4) Irreconcilably Conflicts with State Law Because the Ordinance Provides for an Exercise of Power that the Statutory Scheme did not Confer to Local Government**

As addressed above, WAC 314-55-020(11) directs that I-502 businesses must comply with local rules that apply to retail businesses in general, such as building and fire codes, and zoning ordinances. The County will likely argue that this regulation constitutes authority to ban marijuana business. However, when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose. *Great W. Shows, Inc. v. Cnty. of Los Angeles*, 27 Cal. 4th 853, 867-68, 44 P.3d 120, 129 (2002) (citing *Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of Rogers*, 27 F.3d 1499, 1506-07 (10th Cir.

1994)). Thus, the City's grant of reasonable regulatory authority does not equate to the power to completely ban in conflict with state law.

Similar regulatory provisions were analyzed in *Wahkiakum*.

WAC 173–308–030(6) requires facilities and sites where biosolids are applied to land to comply with other applicable federal, state and local laws, regulations and ordinances, such as zoning and land use requirements. This regulation recognizes that land application of biosolids does not exist in a vacuum, but rather, that there are other laws that may also apply to facilities and sites engaging in land application of biosolids. This is reflected in the other sections of WAC 173–308–030 which, for example, recognize that fertilizers also have to comply with Department of Agriculture requirements and transportation of biosolids also have to comply with regulations of the Washington State Utilities and Transportation Commission. Read in context, WAC 173–308–030(6) provides for additional local regulation required under other applicable laws. Thus, the County may regulate biosolids if necessary to comply with other applicable laws. However, the County does not have the authority to completely ban the land application of all class B biosolids when that ban conflicts with state law.

*Wahkiakum*, 337 P.3d at 370-71. Similarly, Clark County is not granted the authority to ban I-502 retail outlets.

WAC 314-55-020(11) has the same operative effect in the context of I-502. This regulation recognizes that production and retailing of marijuana is subject to the same general zoning and safety requirements as any other business which may operate in their jurisdiction. However, the legislature expressly granted the

WSLCB authority to site and license I-502 retailers. Thus, the legislature intended WSLCB have the final say regarding the distribution and location of retail outlets, not the local government.

**E. CCC 40.260.115(B)(4) IS STATUTORILY PREEMPTED BY STATE LAW BECAUSE THE STATE OF WASHINGTON EXPRESSLY PREEMPTS THE FIELD OF REGULATION OF RECREATIONAL MARIJUANA.**

Preemption occurs when the Legislature states its intention either expressly or by necessary implication to preempt the field. *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991). If the Legislature is silent as to its intent to occupy a given field, the court may look to the purposes of the statute and to the facts and circumstances upon which the statute was intended to operate. *Lenci v. Seattle*, 63 Wn.2d 664, 669, 388 P.2d 926 (1964). If, however, the Legislature “affirmatively expresses its intent, either to occupy the field or to accord concurrent jurisdiction, there is no room for doubt.” *Id.* at 670. Here, there is no room for doubt.

The legislature is not silent as to its intent to occupy the field of recreational marijuana regulation. The state of Washington fully occupies and preempts the entire field of setting penalties for violations of the State’s controlled substances act and only authorizes cities to enact ordinances relating to controlled

substances that are consistent with the state controlled substances act. RCW 69.50.608. In addition to the Legislature's express declaration, their intent to preempt the field can be implied from the subject matter and the intent of the act.

**a. State law expressly preempts the field of setting penalties for violations of Washington's Uniform Controlled Substances Act.**

RCW 69.50.608 expresses the Legislature's intent to preempt the field of setting penalties for violations of the controlled substances act. The statute states:

[t]he state of Washington fully occupies and preempts the entire field of setting penalties for violations of the controlled substances act. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to controlled substances that are consistent with this chapter. Such local ordinances shall have the same penalties as provided for by state law. Local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted.

RCW 69.50.608.

**b. CCC 40.260.115(B)(4) is not consistent with RCW 69.50 et seq. and is thus preempted.**

The County will likely rely on *City of Tacoma v. Luvane* to support its position that the Legislature did not expressly preempt the field of recreational marijuana regulation. 118 Wn.2d 826, 827 P.2d 1374 (1992). The County's reliance is misplaced. In *Luvane*,

our Supreme Court determined that RCW 69.50.608 expressly preempts the field of setting penalties for violations of the UCSA (Chapter 69.50 RCW). While the *Luvene* Court found the statute grants *some measure* of concurrent jurisdiction to municipalities, any ordinance adopted in the exercise of this jurisdiction must be “consistent with the UCSA.” *Id.* at 834 (emphasis added). CCC 40.260.115(B)(4) is not consistent with the UCSA. An ordinance which outright bans and completely subverts the tightly regulated state licensing scheme set forth in RCW 69.50 *et seq.* cannot be deemed consistent with Washington law.

**c. Chapter 69.50 RCW does not grant municipalities concurrent authority.**

While RCW 69.50.608 contemplates the existence of “ordinances relating to controlled substances that are consistent,” there is no express grant of concurrent jurisdiction within the UCSA. *Id.* The grant of jurisdiction in RCW 69.50.608 is conditional; any enacted ordinance must be consistent with the rest of the Act.

There is no express nod to localities as to how they will be involved in zoning, administration, or taxation or any other subject that is not consistent with the UCSA. We assume the Legislature “means exactly what it says.” *Davis v. Dep’t of Licensing*, 137

Wn.2d 957, 964, 977 P.2d 554 (1999). Here, the Legislature unambiguously elected not to grant cities specific authority to restrictively zone or the authority to ban I-502 uses. Because the plain language of the UCSA lacks such authorization, the County's authority must be limited to ordinances *consistent* with the UCSA.

**d. The Legislature's intent to preempt the field is implied by the purposes of the statute and by the facts and circumstances upon which the statute was intended to operate**

The court considers several factors when examining whether the Legislature has preempted an area by implication. One factor evincing legislative intent to preempt is whether the Legislature has created a single uniform standard intended for state-wide application. *Spokane v. Portch*, 92 Wn.2d 342, 348, 596 P.2d 1044 (1979) (need for a single standard defining obscenity was a factor indicating preemption by implication in the area). The greater the local concern in a particular area of legislation, the less likely a single uniform state-wide standard is needed and the less likely a local ordinance will be preempted by state legislation in the area. *Pasco v. Ross*, 39 Wn. App. 480, 482, 694 P.2d 37 (1985) (subject of criminal assault one of mixed state and local concern; therefore local assault ordinance not preempted by state criminal statute).

Here, the statewide production and distribution of marijuana requires a uniform standard. Thus, the state preemption is implicated.

The court may also look to the purposes of the statute and to the facts and circumstances upon which the statute was intended to operate. *Lenci*, 63 Wn.2d at 669. I-502 was enacted by a majority of the voters of Washington. The stated intent in enacting I-502 follows.

To stop treating adult marijuana use as a crime and try a new approach that:

- (1) Allows law enforcement resources to be focused on violent and property crimes;
- (2) Generates new state and local tax revenue for education, health care, research, and substance abuse prevention; and
- (3) Takes marijuana out of the hands of illegal drug organizations and brings it under a tightly regulated, state-licensed system similar to that for controlling hard alcohol.

Laws of 2013, c 3, § 1 (Initiative 502, Part I “Intent,” Section 1). This measure authorizes the Washington State Liquor and Cannabis Board to regulate and tax marijuana for persons twenty-one years of age and older and it adds a new threshold for driving under the influence of marijuana. *Id.* Allowing bans such as Clark County Ordinance 40.260.115(B)(4) render this intent meaningless.

The State of Washington Voters' Pamphlet for the November 6, 2012, General Election, also provides extrinsic evidence of the voters' intent. CP 130; See *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wn.2d 736, 752, 257 P.3d 586 (2011). Here, the voters' pamphlet reinforces what has already been determined above. The pamphlet specifically states that "[a] license to process marijuana would make it legal under state law to process and package marijuana . . . Licensed retailers could sell marijuana, and products containing marijuana, to consumers at retail." CP 153. The pamphlet continues, providing that "[t]he *state* could deny, suspend, or cancel licenses. Local governments could submit objections for the state to consider in determining whether to grant or renew a license." CP 153 (emphasis added).

A holistic review of the voters' pamphlet makes it clear that the intent was that the WSLCB would be the regulatory authority and that the voters' intended that marijuana be accessible and sold at retail without interference from local authorities. The Legislature has stated its intention expressly and by necessary implication to preempt the field. CCC 40.260.115(B)(4) thus exceeds the County's authority and should be invalidated.

#### **IV. CONCLUSION**

Municipalities generally possess constitutional authority to enact zoning ordinances as an exercise of their police power. However, a municipality may not enact a zoning ordinance that conflicts with state law. CCC 40.260.115(B)(4) conflicts with state law because it prohibits lawful marijuana business activity that is expressly permitted under state law. The ordinance further conflicts as it thwarts the legislature's intent to create a statewide production and distribution system. Moreover, CCC 40.260.115(B)(4) is an exercise of power that I-502 law did not confer to local governments.

I-502 is thorough and creates a pervasively regulated industry to which the Legislature did not leave room for localities to interfere. CCC 40.260.115(B)(4) irreconcilably conflicts with I-502. Accordingly, the Court should reverse the County Hearing Examiner.

RESPECTFULLY SUBMITTED this 20th day of March 2017.

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### **CERTIFICATE OF SERVICE**

I certify, under penalty of perjury under the laws of the State of Washington, that I served, via electronic mail, a true and correct copy of the pleading to which this certification is attached, upon the following:

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**Appeal of Shore, 524 Pa. 436 (1990)**

573 A.2d 1011

524 Pa. 436  
Supreme Court of Pennsylvania.

In re Appeal of Arthur SHORE from the Decision  
of the Board of Supervisors of Solebury Township  
denying Request for Curative Amendment.  
Appeal of SOLEBURY TOWNSHIP.

Argued Oct. 27, 1988. | Decided April 26, 1990.

Township board of supervisors rejected landowner's constitutional attack on ordinance excluding mobile home parks. The Court of Common Pleas, Bucks County, Edward G. Biester, Jr., J., affirmed, and landowner appealed. The Commonwealth Court, 91 Pa.Cmwlt. 7, 496 A.2d 876, affirmed. Thereafter, the Supreme Court, 515 Pa. 306, 528 A.2d 576, vacated and remanded for reconsideration in light of Supreme Court judicial decision. On remand, the Commonwealth Court, 107 Pa.Cmwlt. 522, 528 A.2d 1045, No. 3 C.D. 1984, Craig, J., reversed Court of Common Pleas' order and remanded. Township petitioned for allowance of appeal. The Supreme Court, No. 17 E.D. Appeal Docket, 1988, Zappala, J., held that: (1) Common Pleas Court's finding that ordinance effectively prohibited mobile home parks was supported by the evidence, and (2) on remand, Court was not required to be guided by statute of municipalities planning code that had been repealed during pendency of appeal.

Affirmed in part, vacated and remanded in part.

Nix, C.J., filed a joining concurring opinion.

McDermott, J., filed a joining concurring opinion in which Papadakos, J., joined.

Larsen, J., filed a dissenting opinion.

West Headnotes (2)

- <sup>[1]</sup> **Zoning and Planning**  
- - Weight and Sufficiency of Evidence in General

Trial court's finding that township zoning ordinance effectively prohibited mobile home parks was supported by the evidence, in

Footnote

landowner's action attacking constitutionality of ordinance, where the ordinance recognized mobile home parks by including a definition of them, but did not list mobile home parks in any of the residential zones, and the enumerated uses and no others were permitted.

7 Cases that cite this headnote

- <sup>[2]</sup> **Zoning and Planning**  
- - Remand and further proceedings below

Court of common pleas was not required, on remand, in case challenging a township's zoning ordinance for failing to provide for mobile home parks, to be guided by a statute under municipalities planning code dealing with appeals of land use decisions that had been repealed during time in which appeal was pending. 53 P.S. § 11011(2); § 11006-A (Repealed).

7 Cases that cite this headnote

**Attorneys and Law Firms**

**\*\*1011 \*437** Stephen B. Harris, Warrington, for appellant.

Edward F. Murphy, Caroline F. Achey, Richard P. McBride, Newtown, for appellee.

**\*\*1012** Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA, PAPADAKOS and STOUT, JJ.

**Opinion**

ZAPPALA, Justice.

We review an order of Commonwealth Court remanding this case to the Court of Common Pleas of Bucks County based on a finding that Solebury Township's zoning ordinance unlawfully prohibited the development of mobile home parks. 107 Pa.Cmwlt. 522, 528 A.2d 1045.

## Appeal of Shore, 524 Pa. 436 (1990)

573 A.2d 1011

The question is whether this ordinance, which provides for a variety of housing types and population densities, is nevertheless exclusionary with regard to its treatment of mobile home parks.

In this protracted litigation, the Township first held that its ordinance did not prohibit mobile home parks, and denied **\*438** the developer's proposed curative amendment. On appeal, the court of common pleas found that the ordinance did prohibit mobile home parks, rejecting the Township's contrary finding for lack of substantial evidence. Nevertheless, the court affirmed the denial of the curative amendment based on its reading of our decision in *In Re: M.A. Kravitz Co., Inc.*, 501 Pa. 200, 460 A.2d 1075 (1983). Commonwealth Court also affirmed, based on the interpretation it had given *Kravitz* in *Fernley v. Board of Supervisors of Schuylkill Township*, 76 Pa.Comm.w. 409, 464 A.2d 587 (1983). While the developer's petition for allowance of appeal was pending, we reversed the Commonwealth Court's decision in *Fernley* at 509 Pa. 413, 502 A.2d 585 (1985). Accordingly, we granted the petition and remanded for reconsideration in light of our decision in *Fernley*. Commonwealth Court then determined that the ordinance improperly excluded mobile home parks, and remanded to the common pleas court for consideration in accordance with 53 P.S. § 11011(2). We granted the Township's petition for allowance of appeal and now affirm.

The Township's primary argument is that this case falls within the rationale of *Kravitz*. There, a plurality of this Court sustained an ordinance that failed to provide for townhouses although provision was made for residential uses other than single family detached dwellings. It did not approve a rule whereby an ordinance prohibiting a given residential use could nevertheless be sustained under the "fair share" analysis of *Surrick*. See 501 Pa. at 210-211, 460 A.2d at 1081. As was later made clear in *Fernley*, an ordinance that prohibits a particular use is not tested by the "fair share" analysis.

An important element of the plurality opinion in *Kravitz*, seemingly ignored in later cases looking to it for guidance, was the distinction between an ordinance prohibiting particular uses and an ordinance failing to provide for particular uses. A zoning ordinance, like all legislative enactments, is presumed to be valid and constitutional; one challenging it bears a heavy burden of proof. Demonstrating that an **\*439** ordinance expressly excludes a particular use is perhaps the most clear-cut means of meeting that burden, for "the constitutionality of total prohibitions ... cannot be premised on the fundamental reasonableness of allocating to each type of activity a particular location in the community." *Exton*

*Quarries Inc. v. Zoning Bd. of Adjustment*, 425 Pa. 43, 59, 228 A.2d 169, 179 (1967). Though the proof is more difficult, it is also possible to show that a use is effectively prohibited throughout the municipality although it is apparently permitted. *Benham v. Middletown Township*, 22 Pa.Comm.w. 245, 349 A.2d 484 (1975).

In *Kravitz*, it was noted that the township had, on review, determined that townhouse development would be permitted in one of the residential districts, not by variance or special exception but as a permitted use. This determination, supported by substantial evidence in the record and affirmed by the court of common pleas, gave indication that the zoning power was not being used unreasonably. In other words, the challenger had not met its burden of proving that the ordinance effectively prohibited the proposed use.

**\*\*1013** <sup>[1]</sup> Although the Township here claims that its ordinance merely fails to provide for mobile home parks, we are satisfied that the common pleas court did not err in characterizing the ordinance as effectively prohibiting mobile home parks. We note particularly that the ordinance recognized mobile home parks by including a definition of them, but did not list them in any of the residential zones, where the enumerated uses *and no others* were permitted. The Board's original rationale, that mobile home parks would be permitted, essentially as subdivisions made available for rent, in either the Residential Development District or the Village Residential District is untenable. Although each individual unit in a mobile home park might qualify as a single family dwelling, the large minimum lot size for each dwelling (20,000 square feet) in those districts would make development of a mobile home park economically unfeasible, allowing at most only 2.1 units per acre *before* accounting **\*440** for road right of way requirements. (By way of comparison, the developer proposed minimum lot sizes of 4300 square feet, at a density of 5.3 units per acre *after* allowing for road right of way and open space, a density described as lower than average for mobile home parks.)

We are aware that some early Commonwealth Court cases affirmed rulings where mobile home parks would have been required to meet minimum lot sizes of 20,000 square feet per dwelling unit. Cf. *Delaware County Investment Corporation v. Zoning Hearing Board of Township of Middletown*, 22 Pa.Comm.w. 12, 347 A.2d 513 (1975); *Colonial Park for Mobile Homes, Inc. v. Zoning Hearing Board*, 5 Pa.Comm.w. 594, 290 A.2d 719 (1972). In *Delaware County Investment*, however, the landowner had sought a *variance* from the township's minimum lot

size regulation and the court found no abuse of discretion in the finding that the landowner had not shown the unique hardship necessary to the grant of a variance. In *Colonial Park*, the court, while acknowledging that such evidence might exist, found no evidence in the record before it from which it could conclude that the burden of demonstrating the unconstitutionality of the ordinance had been met. Here, as stated, the court of common pleas ruled otherwise on the record before it, Commonwealth Court affirmed, and we find no error.

<sup>12]</sup> Commonwealth Court remanded this case to the court of common pleas for entry of an order consistent with Section 1011(2) of the Municipalities Planning Code, 53 P.S. § 11011(2). While this appeal was pending, however, the General Assembly repealed Article X of the Code, dealing with appeals of land use decisions, and replaced it with Article X-A, Act 1988-170. Unlike Section 1011(2), new Section 1006-A, 53 P.S. § 11006-A, does not enumerate specific factors that a court must consider in granting relief. Rather, as it did in 1972, the Code now grants courts broad discretion to approve the proposed use “as to all elements,” or to approve it “as to some elements, refer [ring] other elements to the [appropriate authority] for \*441 further proceedings, including adoption of alternative restrictions, in accordance with the court’s opinion and order.” Although Act 1988-170 contained no indication as to whether the legislature intended it to be applicable to cases pending when it became effective, it would be inappropriate to require the court, on remand, to be guided by a statute that has been repealed.

The appellee argues that the proper relief in this case is entry of judgment ordering approval of the development *as filed*. This Court, however, is not in a position to determine the extent to which the proposal ought to be approved. The court of common pleas is best situated to judge whether the development should be approved as filed or whether the Board, under the supervision of the court, may require adherence to certain reasonable regulations.

Insofar as it reverses the August 7, 1985 order of the Court of Common Pleas of Bucks County, the order of the Commonwealth Court is affirmed. Insofar as it remands for entry of a supplemental order consistent with Section 1011(2) of the Municipalities ~~\*\*1014~~ Planning Code, 53 P.S. § 11011(2), the order of the Commonwealth Court is vacated. The case is remanded to the Court of Common Pleas of Bucks County for entry of an order and proceedings consistent with Section 1006-A of the Municipalities Planning Code, 53 P.S. § 11006-A. The court of common pleas shall retain jurisdiction during the

pendency of this matter.

Jurisdiction relinquished.

STOUT, J., did not participate in the decision of this case.

NIX, C.J., files a joining concurring Opinion.

McDERMOTT, J., files a joining concurring Opinion in which PAPADAKOS, J., joins.

LARSEN, J., files a dissenting Opinion.

NIX, Chief Justice, concurring.

I join the opinion of Mr. Justice Zappala and write separately to emphasize the obligation of the lower court, in its \*442 supervisory capacity over the Board, to apply only *reasonable* restrictions, if any, upon the development or use as filed. It is true the pertinent language of the Pennsylvania Municipalities Planning Code, 53 P.S. § 10101, et seq., (“the Code”), gives broad discretion to the courts to “order the described development or use approved as to all elements or ... order it approved as to some elements and refer other elements to the governing body agency or officer having jurisdiction thereof for further proceedings, including the adoption of alternative restrictions, in accordance with the court’s opinion and order.” 53 P.S. § 11006-A(c). However that discretion must be exercised within a frame of reference allowing the proposed development or use of the successful challenger, in this case Arthur Shore, as impacted by those purposes enumerated in Section 10105 of the Code.<sup>1</sup> Restrictions posing insuperable difficulties or economic impracticability shall not and will not be countenanced irrespective of any rationale advanced therefor.

McDERMOTT, Justice, concurring.

The retributory concepts underlying *Fernley*,<sup>1</sup> that communities should be somehow punished because, unlike enterprising developers, they did not foresee all the commercial and residential possibilities in their community and therefore lost their opportunity for rational development is here ended. The anomaly that owners of land could have \*443 more than reason would allow, because they caught the municipality sleeping, is an invidious and destructive concept for any rational planning for the health and welfare of the community involved.

The legislature<sup>2</sup> has wisely given broad authority to courts

**Appeal of Shore, 524 Pa. 436 (1990)**

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to give no more than the circumstances require and the community can stand. I trust the court below will fully understand, in exercising that discretion, that the “Fernley ticket” to any special advantage has been cancelled.

I join the majority.

PAPADAKOS, J., joins this concurring opinion.

**\*\*1015** LARSEN, Justice, dissenting.

I vigorously dissent.

The Commonwealth Court was correct in holding that Solebury Township’s zoning ordinance unconstitutionally excludes the development of mobile home parks. The majority is incorrect in framing this issue as a matter of factual dispute.<sup>1</sup> Ordinances rise and fall on their face. A use is either included or it is excluded *as a matter of law*, and this matter is quite simply determined by reading the ordinance. A party to an exclusionary zoning dispute cannot by evidence show that apples are oranges or that two plus two equals five. Trial courts need not pore over the records in these cases to find evidence of inclusion or exclusion. Rather, they must examine the plain meaning of **\*444** the ordinances themselves, using the statutory rules of construction to interpret the words of the ordinances. To allow the meanings of the ordinances to depend upon what zoning boards wish them to mean is to throw the law into chaos, and will encourage these governing bodies to continue engaging in practices that exclude persons of moderate and limited income from residing in their communities.

Footnotes

<sup>1</sup> § 10105. Purpose of Act

It is the intent, purpose and scope of this act to protect and promote safety, health and morals; to accomplish coordinated development; to provide for the general welfare by guiding and protecting amenity, convenience, future governmental, economic, practical, and social and cultural facilities, development and growth, as well as the improvement of governmental processes and functions; to guide uses of land and structures, type and location of streets, public grounds and other facilities; to promote the conservation of energy through the use of planning practices and to promote the effective utilization of renewable energy sources; and to permit municipalities to minimize such problems as may presently exist or which may be foreseen.

<sup>1</sup> *Fernley v. Board of Supervisors of Schuylkill Township*, 509 Pa. 413, 502 A.2d 585 (1985).

<sup>2</sup> Pa. Municipal Planning Code, 53 P.S. § 10101, *et seq.*

<sup>1</sup> The majority states that “the court of common pleas found that the ordinance did prohibit mobile home parks, rejecting the Township’s contrary finding *for lack of substantial evidence*.” Maj. op. at 1 (emphasis added). In discussing *In Re*:

File:

In addition, the majority commits grievous error in remanding the case for entry of an order and proceedings consistent with a section of the Municipalities Planning Code which came into effect *after* the case was argued to this Court.<sup>3</sup> A majority of this Court previously considered the 1978 amendment that was made to *this* section of the Code, and determined that a retroactive application of the amendment to a case which challenged a zoning ordinance before the amendment went into effect constituted a violation of due process. *Fernley v. Board of Supervisors of Schuylkill Township*, 509 Pa. 413, 502 A.2d 585 (1985), *reargument denied*.

It is manifestly unjust to change the “rules of the game” while a case wends its cumbersome way through our appellate system. We are always striving to achieve predictability in the law, so that citizens can be able to continually keep their affairs and behavior in order. The majority today, by giving retroactive effect to section 1006-A of the Code, 53 P.S. 11006-A, seriously undermines this goal.

Accordingly, I would affirm the order entered by the Commonwealth Court wherein it remanded the case to the Court of Common Pleas of Bucks County for the entry of an order consistent with the provisions of section 1011(2) of the Code, 53 P.S. § 11011(2), with the common pleas court retaining jurisdiction for the purposes of ensuring that development is not prevented or unduly burdened for reasons of retribution.

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*Co., Inc.*, 501 Pa. 200, 460 A.2d 1075 (1983), the majority states that the township's determination that townhouse development was a permitted use was "supported by *substantial evidence* in the record and affirmed by the court of common pleas." Maj. op. at 3 (emphasis added). And in discussing *Colonial Park for Mobile Homes, Inc. v. Zoning Hearing Board*, 5 Pa. Commw. 594, 290 A.2d 719 (1972), the majority states that "the court, while acknowledging that such evidence might exist, *found no evidence in the record* before it from which it could conclude that the burden of demonstrating the unconstitutionality of the ordinance had been met." Maj. op. at 4-5 (emphasis added).

- <sup>2</sup> Section 1011(2), 53 P.S. § 11011(2), was repealed and section 1006-A, 53 P.S. § 11006-A, was enacted on December 21, 1988, to become effective in 60 days, or approximately four months after the case was argued.

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**Blue Circle Cement, Inc. v. Board of County Com'rs of County..., 27 F.3d 1499 (1994)**

38 ERC 2073, 24 Env'tl. L. Rep. 21,539

27 F.3d 1499  
United States Court of Appeals,  
Tenth Circuit.

BLUE CIRCLE CEMENT, INC.,  
Plaintiff–Appellant,  
v.

BOARD OF COUNTY COMMISSIONERS OF the  
COUNTY OF ROGERS, Defendant–Appellee.

No. 92–5174. | June 22, 1994.

Operator of quarry and cement manufacturing plant brought action against board of county commissioners alleging that hazardous waste zoning ordinance was preempted by Resource Conservation and Recovery Act (RCRA), violated commerce clause, and could not be equitably applied to operator. The United States District Court for the Northern District of Oklahoma, James O. Ellison, Chief Judge, upheld ordinance. Operator appealed. The Court of Appeals, Ebel, Circuit Judge, held that: (1) genuine issues of material fact existed, precluding summary judgment on issue of whether ordinance was preempted by RCRA; (2) district court erroneously failed to conduct *Pike* analysis in determining whether ordinance violated dormant commerce clause; and (3) genuine issues of material fact existed as to whether ordinance violated dormant commerce clause, precluding summary judgment.

Affirmed in part, and reversed and remanded in part.

West Headnotes (20)

<sup>111</sup> **Federal Courts**  
- - Summary judgment

Court of Appeals reviews de novo district court's summary judgment order and applies same legal standard used by district court. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

8 Cases that cite this headnote

<sup>121</sup> **Federal Courts**  
- - Summary judgment

Court of Appeals' de novo standard of review on appeal from decision on summary judgment applies both to district court's federal constitutional legal issues and its determinations of state law.

8 Cases that cite this headnote

<sup>131</sup> **Federal Courts**  
- - Summary judgment

On appeal from district court decision on summary judgment, Court of Appeals construes factual record and reasonable inferences therefrom in light most favorable to party opposing summary judgment.

56 Cases that cite this headnote

<sup>141</sup> **Federal Courts**  
- - Summary judgment

District court's failure to comply with notice requirements of summary judgment rule when motion to dismiss for failure to state a claim is converted to one for summary judgment constitutes harmless error if dismissal can be justified under standards governing motions to dismiss for failure to state a claim without reference to matters outside complaint. Fed.Rules Civ.Proc.Rules 12(b)(6), 56, 28 U.S.C.A.

4 Cases that cite this headnote

<sup>151</sup> **Environmental Law**  
- - Federal preemption  
**Municipal Corporations**  
- - Political Status and Relations

**States**

- Environment; nuclear projects

Resource Conservation and Recovery Act (RCRA) neither expressly nor impliedly preempts state and local hazardous waste regulations that are more restrictive than RCRA. Solid Waste Disposal Act, §§ 1002 et seq., 3009, as amended, 42 U.S.C.A. §§ 6901 et seq., 6929; U.S.C.A. Const. Art. 6, cl. 2.

4 Cases that cite this headnote

<sup>16]</sup>

**Environmental Law**

- Federal preemption

**Municipal Corporations**

- Political Status and Relations

To determine whether local ordinance frustrates purposes of Resource Conservation and Recovery Act (RCRA), for purposes of determining whether RCRA preempts ordinance, court must consider whether local regulation is consistent with structure and purpose of federal statute as a whole. Solid Waste Disposal Act, § 1002 et seq., as amended, 42 U.S.C.A. § 6901 et seq.

3 Cases that cite this headnote

<sup>17]</sup>

**Environmental Law**

- Federal preemption

**Municipal Corporations**

- Political Status and Relations

Local ordinances that amount to explicit or de facto total ban of activity that is otherwise encouraged by Resource Conservation and Recovery Act (RCRA) will ordinarily be preempted by the Act. Solid Waste Disposal Act, § 1002 et seq., as amended, 42 U.S.C.A. § 6901 et seq.; U.S.C.A. Const. Art. 6, cl. 2.

3 Cases that cite this headnote

<sup>18]</sup>

**Environmental Law**

- Federal preemption

**Municipal Corporations**

- Political Status and Relations

Local ordinance that falls short of imposing total ban on activity encouraged by Resource Conservation and Recovery Act (RCRA) will ordinarily be upheld as not being preempted by RCRA so long as it is supported by record establishing that is reasonable response to legitimate local concern for safety or welfare, and significant latitude should be allowed to state or local authority. Solid Waste Disposal Act, § 1002 et seq., as amended, 42 U.S.C.A. § 6901 et seq.; U.S.C.A. Const. Art. 6, cl. 2.

7 Cases that cite this headnote

<sup>19]</sup>

**Environmental Law**

- Federal preemption

**Municipal Corporations**

- Political Status and Relations

If local ordinance regulating hazardous waste is not addressed to legitimate local concern, or if it is not reasonably related to that concern, then it may be regarded as a sham and nothing more than a naked attempt to sabotage federal Resource Conservation and Recovery Act's (RCRA) policy of encouraging safe and efficient disposition of hazardous waste materials and may be preempted by RCRA. U.S.C.A. Const. Art. 6, cl. 2; Solid Waste Disposal Act, § 1002 et seq., as amended, 42 U.S.C.A. § 6901 et seq.

3 Cases that cite this headnote

<sup>110]</sup>

**Municipal Corporations**

- Political Status and Relations

Objective, rather than subjective, analysis applies in determining whether a local ordinance is preempted by federal law. U.S.C.A. Const. Art. 6, cl. 2.

1 Cases that cite this headnote

**111] Federal Civil Procedure**

- Environmental law, cases involving

Genuine issue of material fact existed as to whether county ordinance governing industrial waste disposal, recycling, and treatment was a reasonable response to protect legitimate local concern or whether it was really a sham, with purpose and effect simply of frustrating policy of Resource Conservation and Recovery Act (RCRA) to encourage recycling of hazardous waste and safe use of hazardous waste fuel, precluding summary judgment on issue of whether local ordinance was preempted by RCRA. Solid Waste Disposal Act, § 1002 et seq., as amended, 42 U.S.C.A. § 6901 et seq.; U.S.C.A. Const. Art. 6, cl. 2.

4 Cases that cite this headnote

**112] Commerce**

- Powers Remaining in States, and Limitations Thereon

Commerce clause not only expressly empowers Congress to regulate commerce among states, but it also impliedly confines states' power to burden interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

1 Cases that cite this headnote

**113] Commerce**

- Powers Remaining in States, and Limitations Thereon

Dormant commerce clause denies states the power unjustifiably to discriminate against or burden interstate flow of articles of commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

3 Cases that cite this headnote

**114] Commerce**

- Local matters affecting commerce

Dormant commerce clause prohibits state or local statute that regulates evenhandedly to effectuate legitimate local public interest if it imposes a burden on interstate commerce that is clearly excessive in relation to putative local benefits. U.S.C.A. Const. Art. 1, § 8, cl. 3.

5 Cases that cite this headnote

**115] Commerce**

- Local matters affecting commerce

When interstate discrimination is not involved, dormant commerce clause challenge to local measure is assessed under *Pike* balancing test; pursuant to that test, if legitimate local purpose is found, then question becomes one of degree, and extent of burden on interstate commerce that will be tolerated will depend on nature of local interest involved and whether it could be promoted as well with lesser impact on interstate activities. U.S.C.A. Const. Art. 1, § 8, cl. 3.

6 Cases that cite this headnote

**116] Commerce**

- Environmental protection regulations

*Pike* balancing test for assessing dormant commerce clause challenge to county hazardous waste zoning ordinance applied, rather than more strict test reserved for statutes that explicitly, or by application, discriminate based upon origins of article of commerce, where county hazardous waste zoning ordinance operated evenhandedly as not distinguishing between hazardous waste generated within county and hazardous waste generated outside county. U.S.C.A. Const. Art. 1, § 8, cl. 3.

2 Cases that cite this headnote

Cases that cite this headnote

- <sup>1171</sup> **Federal Civil Procedure**  
- Environmental law, cases involving

Genuine issues of material fact existed as to nature of putative local benefits advanced by county hazardous waste zoning ordinance, burden ordinance imposed on interstate commerce, whether burden was clearly excessive in relation to local benefits, and whether local interests could be promoted with lesser impact on interstate commerce, precluding summary judgment on issue of whether ordinance violated dormant commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

5 Cases that cite this headnote

- <sup>1181</sup> **Zoning and Planning**  
- Change of regulations as affecting right

It was not inequitable to subject operator of quarry and cement manufacturing plant to amended hazardous waste zoning ordinance requiring conditional use permit for burning of hazardous waste fuel in cement kilns where operator had not yet applied for conditional use permit at time of amendment and thus was not, as of that time, entitled to convert to hazardous waste fuel even under original version of ordinance.

1 Cases that cite this headnote

- <sup>1191</sup> **Federal Courts**  
- Questions Presented for Review

Court of Appeals ordinarily will decline to consider a claim in the absence of appropriate documents in record on appeal, since any discussion of such a claim would be speculation.

- <sup>1201</sup> **Federal Courts**  
- Matters of Substance

Court of Appeals would not consider allegation that county board of commissioners' amendment to hazardous waste zoning ordinance constituted unlawful exercise of police power where that issue was not raised in plaintiff's amended complaint nor in its motion for summary judgment.

Cases that cite this headnote

#### Attorneys and Law Firms

\***1501** Charles W. Shipley of Shipley, Inhofe & Strecker, Tulsa, OK (Douglas L. Inhofe, Blake K. Champlin, and Mark A. Waller, with him on the brief) for plaintiff-appellant.

Bill M. Shaw, Asst. Dist. Atty., Claremore, OK (Gene Haynes, Dist. Atty., with him on the brief) for defendant-appellee.

Before EBEL, SETH, and KELLY, Circuit Judges.

#### Opinion

EBEL, Circuit Judge.

This case arises from a municipality's exercise of its zoning authority to regulate hazardous waste disposal, recycling, and treatment within its borders. The Plaintiff-Appellant, Blue Circle Cement, Inc. ("Blue Circle"), raises both federal constitutional and state law challenges to the hazardous waste zoning ordinance enacted by the Defendant-Appellee, the Board of County Commissioners of Rogers County, Oklahoma (the "Board"). The district court upheld the Board's ordinance in a summary judgment order. We have jurisdiction under 28 U.S.C. § 1291 to consider the four questions raised in Blue Circle's appeal: (1) whether the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq., preempts the Board's ordinance; (2) whether

the ordinance violates the Commerce Clause of the United States Constitution; (3) whether subjecting Blue Circle to the Board's amendment to the ordinance would be inequitable under *In re Julius Bankoff*, —Okl. —, 875 P.2d 1138 a recent decision of the Oklahoma Supreme Court; and (4) whether the Board's amendment to the ordinance constituted an unlawful exercise of police power.<sup>1</sup> Because we conclude that the court erred in its evaluation of the RCRA preemption and Commerce Clause claims, and thus erred in granting summary judgment, we reverse and remand for further proceedings.

### **I. Background**

Blue Circle, an Alabama corporation with its principal place of business in Georgia, operates a quarry and cement manufacturing plant in Rogers County, Oklahoma. Since opening this facility in 1960, Blue Circle has used coal and natural gas as fuel in its cement kilns. To reduce the cost of heating its kilns, Blue Circle sought to convert to Hazardous Waste Fuels ("HWFs"), which are \*1502 derived from the blending of various industrial wastes and possess high British Thermal Unit ("BTU") value.<sup>2</sup> The Board's regulatory actions in direct response to Blue Circle's proposed fuel conversion project gave rise to this dispute.

Initially, Blue Circle concluded that the Board's approval to use HWFs was unnecessary. The zoning ordinance in effect when Blue Circle commenced its fuel conversion project in the early 1980s required industrial operators to obtain a conditional use permit to establish an "industrial waste disposal" site. See § 3.13.2 of the City of Claremore-Rogers County Metropolitan Planning Commission Zoning Ordinance (the "Ordinance"). Blue Circle contended that burning HWFs in its cement kilns constituted "recycling" or "burning for energy recovery," not disposal. Because the Ordinance made no mention of recycling operations, Blue Circle argued that it was free to purchase, store, and burn HWFs at its site without first obtaining a conditional use permit. To accomplish the conversion, Blue Circle incurred design, engineering, and planning expenses in preparation for the switch to HWFs. The company entered into an agreement with CemTech, Inc., contingent upon obtaining the necessary governmental approval, to construct a storage area for HWFs and to supply HWFs to its Rogers County facility.

However, the Board disagreed with Blue Circle's interpretation of the Ordinance and informed company officials that burning HWFs in the cement kilns required a conditional use permit. On August 12, 1991, the Board

adopted an advisory resolution stating that "there is no distinction between a hazardous waste alternative fuel burning facility as a recycling facility or an industrial waste disposal site or hazardous waste incinerator." The regulatory force of this advisory resolution remains uncertain, but the Board explained its action as an effort to thwart Blue Circle's attempt to circumvent the conditional use permit requirement under the original terms of § 3.13.2.

On August 21, 1991, rather than apply for a conditional use permit to burn HWFs at its cement plant, Blue Circle filed suit in the United States District Court for the Northern District of Oklahoma, seeking a declaratory judgment under 28 U.S.C. § 2201 that the use of HWFs did not constitute industrial "disposal." On December 2, 1991, while Blue Circle's suit was pending, the Board ended any ambiguity about the characterization of Blue Circle's use of HWFs by amending the Ordinance to include "recycling" and "treatment" sites among those facilities for which the Ordinance requires a conditional use permit. By this express language, the Board unequivocally subjected hazardous waste recycling and treatment to the same regulatory and permit scheme that was applicable to industrial waste disposal.

Blue Circle then filed an amended complaint alleging that the Ordinance as amended was preempted by RCRA, was violative of the Commerce Clause, and could not equitably be applied to Blue Circle because the company had commenced its fuel conversion project while the former ordinance was in effect. On June 23, 1992, the district court denied Blue Circle's two summary judgment motions, denied the Board's motion to dismiss, and scheduled the case for a bench trial to be held on August 3, 1992.

On the eve of the scheduled trial, however, and without affording the parties prior notice, the court removed the case from its docket. On August 4, 1992, the court sua sponte issued a summary judgment order in favor of the Board. The court held that: (1) RCRA did not preempt the Board's zoning Ordinance; (2) the Ordinance did not violate the Commerce Clause of the United States Constitution; and (3) the Board's amended ordinance was constitutional as applied to \*1503 Blue Circle because Blue Circle had not acquired a vested right to use HWFs at its plant prior to the amendment. We will review in turn each of the district court's rulings which were raised in Blue Circle's timely appeal.

### **II. Conversion to a Summary Judgment Order**

[1] [2] [3] We review de novo the district court's summary judgment order and apply the same legal standard used by the court under Fed.R.Civ.P. 56(c). *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Our de novo standard of review applies both to the court's federal constitutional legal conclusions and its determination of state law. *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 495 (10th Cir.1992). In applying this standard, we construe the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir.1993).

Before addressing the merits of Blue Circle's challenge to the Ordinance, we must consider the procedural history of this litigation and Blue Circle's contention that the district court's procedures prejudiced it.

After Blue Circle filed its original complaint on August 21, 1991, the Board moved to dismiss under Fed.R.Civ.P. 12(b)(6) on September 9, 1991. One day later, Blue Circle moved for summary judgment. While both motions were still pending before the district court, Blue Circle filed an amended complaint on August 22, 1992. The court next convened a pretrial conference on June 23, 1992, during which it denied both the Board's original motion to dismiss and Blue Circle's summary judgment motion. The court scheduled a bench trial for August 3, 1992. In lieu of the scheduled bench trial, however, the court sua sponte reversed its denial of the Board's Rule 12(b)(6) motion to dismiss, converted it into one for summary judgment under Rule 56, and upheld the Ordinance on all grounds. Order of August 4, 1992.

Rule 12(b) authorizes a court to treat a motion to dismiss as one for summary judgment, provided that the court affords the parties a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.R.Civ.P. 12(b). Rule 56(c) grants the non-moving party ten days to accumulate evidence demonstrating the existence of a genuine issue of material fact prior to the court's evidentiary hearing. We have held that a court's failure to comply with the notice requirements when changing a Rule 12(b) motion to one for summary judgment may constitute reversible error. *See Ohio v. Petersen, Lowry, Rall, Barber & Ross*, 585 F.2d 454, 457 (10th Cir.1978); *Torres v. First State Bank of Sierra County*, 550 F.2d 1255, 1257 (10th Cir.1977); *Adams v.*

*Campbell County School District*, 483 F.2d 1351, 1353 (10th Cir.1973).

[4] What drove our analysis in these cases was the obvious prejudice that inures to the non-moving party when, faced with a Rule 12(b)(6) motion, the court consults materials outside the complaint, yet deprived the non-moving party "the opportunity to be heard ... to present controverting material and ... to amend." *Adams*, 483 F.2d at 1353. However, a court's failure to comply with the notice requirements of Rule 56 constitutes harmless error if the dismissal can be justified under Rule 12(b)(6) standards without reference to matters outside the plaintiff's complaint. *Miller v. Glanz*, 948 F.2d 1562, 1566 (10th Cir.1991).

Here, we can review the district court's legal rulings because the parties had fully briefed the RCRA preemption, Commerce Clause, and state law issues in the context of Blue Circle's summary judgment motion. We conclude that the court erred with regard to some of the critical legal rulings. Moreover, it is apparent that there remain genuine disputes of material fact and that Blue Circle was prejudiced by being denied the opportunity to present its own factual materials \*1504 in opposition to summary judgment against it. Therefore, we reverse the summary judgment and remand for further proceedings.

### III. RCRA Preemption

In our review of the merits of Blue Circle's challenge to the Rogers County Ordinance, we first assess whether RCRA preempts the Ordinance's restrictions on hazardous waste treatment and recycling within the County. This inquiry requires us to consider RCRA's division of hazardous waste regulatory authority between the federal government, on the one hand, and States and their political subdivisions, on the other.

#### A.

The Supreme Court's jurisprudence under the Supremacy Clause of the United States Constitution identifies both express and implied forms of federal preemption, which are "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, —, 112 S.Ct. 2374, 2383, 120 L.Ed.2d 73 (1992) (quoting *Jones v. Rath*

*Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)).<sup>3</sup> As the Court in *Gade* explained,

Absent explicit pre-emptive language, we have recognized at least two types of implied preemption: field pre-emption, where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," [*Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) ] ... and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 [83 S.Ct. 1210, 1217, 10 L.Ed.2d 248] (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 [61 S.Ct. 399, 404, 85 L.Ed. 581] (1941).

*Id.*<sup>4</sup>

<sup>15]</sup> Here, although there may very well be both express and implied preemption by RCRA of more permissive state and local regulations pertaining to hazardous wastes, it is clear that we have neither express preemption nor implied field preemption of state and local hazardous waste regulations that are more restrictive than RCRA. Under § 6929 of RCRA, Congress expressly empowers state and local governments to adopt solid and hazardous waste management regulations that are "more stringent" than those imposed on the federal level by the Environmental Protection Agency ["EPA"] pursuant to RCRA. Section 6929 provides in pertinent part:

[N]o State or political subdivision may impose any requirements *less stringent* than those authorized under this subchapter respecting the same matter as governed by such regulations.... Nothing in this subchapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are *more stringent* than those imposed by such regulations.

42 U.S.C. § 6929 (emphasis added). Accordingly, Congress explicitly intended not to foreclose state and local oversight of hazardous waste management more strict than federal requirements. *Old Bridge Chemicals, Inc. v. New Jersey Dept. of Environmental Protection*, 965 F.2d 1287, 1292 (3d Cir.) ("[A]lthough waste

management may be an area of overriding national importance, in legislating in the field Congress has set only a floor, and not a ceiling, beyond which states may go in regulating the treatment, storage, \*1505 and disposal of solid and hazardous wastes."), *cert. denied*, 506 U.S. 1000, 113 S.Ct. 602, 121 L.Ed.2d 538 (1992); *ENSCO, Inc. v. Dumas*, 807 F.2d 743, 744-45 (8th Cir.1986) (same); *LaFarge Corp. v. Campbell*, 813 F.Supp. 501, 508 (W.D.Tex.1993) (same); *North Haven Planning & Zoning Comm'n v. Upjohn Co.*, 753 F.Supp. 423, 429 (D.Conn.) (same), *aff'd*, 921 F.2d 27 (2d Cir.1990), *cert. denied*, 500 U.S. 918, 111 S.Ct. 2016, 114 L.Ed.2d 102 (1991). See also *City of Philadelphia v. New Jersey*, 437 U.S. 617, 620-21 n. 4, 98 S.Ct. 2531, 2534 n. 4, 57 L.Ed.2d 475 (1978) (concluding that neither the statutory language of RCRA nor its implicit legislative design demonstrate congressional intent to preempt the entire field of waste management).

Thus, if the Board's ordinance were to run afoul of the Supremacy Clause, it would only be because of the form of implied preemption that precludes a state or local regulation from frustrating the full accomplishment of congressional purposes embodied in a federal statute—in this case, RCRA. *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

<sup>16]</sup> In order to determine whether this Ordinance frustrates the purposes of RCRA, we must consider "whether [the local] regulation is consistent with the structure and purpose of the [federal] statute *as a whole*." *Gade*, 505 U.S. at —, 112 S.Ct. at 2383 (emphasis added); *Colorado Public Utilities Comm'n v. Harmon*, 951 F.2d 1571, 1580 (10th Cir.1991) (posing test as whether state law "stands as an obstacle to the accomplishment and execution of the *full purposes and objectives* of Congress") (quoting *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985)).

## B.

RCRA is the comprehensive federal hazardous waste management statute governing the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment.<sup>5</sup> Enacted in 1976, RCRA authorized a multifaceted federal regulatory, permit, and enforcement regime to address the "overriding concern of ... the effect on the population and the environment of the disposal of discarded hazardous wastes—those which by virtue of their composition or longevity are harmful, toxic or lethal." H.R.Rep.

94–1491, 94th Cong., 2d Sess. at 3 (1976), *reprinted in*, 1976 U.S.C.C.A.N. 6238, 6241.

One of RCRA's stated purposes is to assist states and localities in the development of improved solid waste management techniques to facilitate resource recovery and conservation. 42 U.S.C. § 6902(a)(1). "[D]iscarded materials have value in that energy or materials can be recovered from them. In the recovery of such energy or materials, a number of environmental dangers can be avoided. Scarce land supply can be protected. The balance of trade deficit can be reduced. The nation's reliance on foreign energy and materials can be reduced...." 1976 U.S.C.C.A.N. at 6241.

The Hazardous and Solid Waste Amendments of 1984 increased RCRA's emphasis on recovery and recycling of hazardous wastes. In those amendments, Congress sought to "minimiz[e] the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment." 42 U.S.C. § 6902(a)(6)). Moreover, Congress articulated as an objective "promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems." 42 U.S.C. § 6902(a)(10). Indeed, the Conference Report for the 1984 amendments underscored Congress' goal to replace land disposal \*1506 with advanced treatment, recycling, and incineration:

[T]he Conferees intend that through vigorous implementation of the objectives of this Act, land disposal will be eliminated for many wastes and minimized for all others, and that advanced treatment, recycling, incineration and other hazardous waste control technologies should replace land disposal.

Conference Report No. 98–1133, 98th Cong., 2d Sess. at 80, *reprinted in* 1984 U.S.C.C.A.N. at pp. 5576, 5651; *ENSCO*, 807 F.2d at 744 (noting Congressional intent to encourage treatment in preference to land disposal of hazardous waste).

RCRA enlists the states and municipalities to participate in a "cooperative effort" with the federal government to develop waste management practices that facilitate the recovery of "valuable materials and energy from solid waste." 42 U.S.C. § 6902(a)(11). At the heart of this federal-state cooperation in hazardous waste regulatory enforcement is § 6929 of RCRA, the so-called savings

clause. That section bars states and municipalities from imposing requirements "less stringent" than the federal provisions, but permits states to adopt "more stringent" provisions.<sup>6</sup> See 42 U.S.C. § 6929; 1976 U.S.C.C.A.N. 6238, 6269–70.

Congress' invitation in § 6929 to the states and political subdivisions to adopt their own hazardous waste regulations is not, however, unbounded. Consistent with *Hines* and its progeny, a state or local zoning ordinance affecting hazardous waste disposal, treatment, and recycling cannot imperil the federal goals under RCRA. The retention of local regulatory authority under § 6929 must be viewed within the parameters of RCRA's stated national objectives in § 6902(a)(6) to minimize the land disposal of hazardous waste by encouraging treatment, resource recovery, and recycling. In this regard, we deem it instructive that the savings clause of § 6929 speaks only in terms of saving to state and local authorities the power to impose more stringent "requirements" and it does not vest in such authorities the power to ban outright important activities that RCRA is designed to promote—including recycling hazardous waste.

If a more stringent hazardous waste regulatory measure is hostile to the federal policy of encouraging hazardous waste treatment, recycling, and materials recovery in place of land disposal, some kind of analysis must take place to determine how severely such an ordinance actually interferes with the federal policy and to evaluate the importance of the local interests that the ordinance purportedly serves.

Although limited in number, the decisions considering § 6929's preemptive effect on local ordinances are instructive. In *ENSCO*, for instance, the Eighth Circuit held that, § 6929 notwithstanding, RCRA preempted a county ordinance that imposed an outright ban on the storage, treatment, or disposal of "acute hazardous waste." *ENSCO*, 807 F.2d at 745. There, as here, when a landowner announced plans to incinerate hazardous waste, the county responded by passing an ordinance to preclude such activity. *Id.* at 744. Relying on the *Hines* federal preemption formulation, the court reasoned that "[a] county cannot, by attaching the label 'more stringent requirements' or 'site selection' to an ordinance that in language and history defies such description, arrogate to itself the power to enact a measure that as a practical matter cannot function other than to subvert federal policies concerning the safe handling of hazardous waste." *Id.* at 745 (noting that RCRA's general objective is to favor hazardous waste treatment over land disposal and to minimize land disposal of such waste to the extent feasible).

Similarly, the Supreme Court of Louisiana held that RCRA preempted a parish ordinance's flat ban on hazardous waste disposal because "spotty ... parochial control" in the nature of a "stifling prohibition" would undermine RCRA's hazardous waste management \*1507 goals. *Rollins Env'tl. Servs. of La. v. Iberville Parish Police Jury*, 371 So.2d 1127, 1132 (La.1979). In facts virtually mirroring those in *ENSCO*, the parish imposed the ban against hazardous waste disposal on the heels of a company's acquisition of a deep well disposal facility in the parish. The court reasoned that RCRA preempted the ban because, otherwise, neighboring parishes would adopt similar bans, the cumulative effect of which would be to cripple RCRA's national objectives. *Id.*; see also *Jacksonville v. Arkansas Dept. of Pollution Control and Ecology*, 308 Ark. 543, 824 S.W.2d 840, 842 (1992) (holding that RCRA preempted the City of Jacksonville's ordinance from barring the incineration of hazardous waste that was not already located at a preexisting incineration plant before the ordinance was enacted, because the local measure frustrated RCRA's "preference for treatment rather than land disposal of hazardous waste"); *Hermes Consol., Inc. v. People*, 849 P.2d 1302, 1311 (Wyo.1993) ("[A]lthough [§ 6929] allows states to adopt more stringent regulations, it does not authorize them to defeat safe federal solutions.... [or] to directly subvert RCRA and [EPA] decisions by outright bans on activities federal authorities considered safe.") (quoting *People v. Teledyne, Inc.*, 233 Ill.App.3d 495, 174 Ill.Dec. 688, 693, 599 N.E.2d 472, 477 (1992)).

In a case that did not involve an express ban, one court nevertheless held that RCRA preempted a city's conditional use permit scheme that, by failing to specify the requirements for obtaining such a permit, preserved unbridled discretion for local lawmakers to deny permits at will. See *Ogden Environmental Services v. City of San Diego*, 687 F.Supp. 1436, 1446-47 (S.D.Cal.1988). In *Ogden*, the landowner obtained an EPA permit to operate a hazardous waste incinerator at its existing facility in San Diego. *Id.* at 1437-38. In response, the San Diego City Council enacted an ordinance requiring a municipal permit for the incinerator. However, the ordinance did not delineate the prerequisites to qualifying for the municipal permit. The City then denied the landowner's permit application. *Id.* at 1440-41. Employing the *Hines* preemption analysis, the court held that § 6929 did not save San Diego's hazardous waste ordinance. *Id.* at 1448.

Inasmuch as San Diego's standardless permit scheme empowered City officials to impose a de facto ban on hazardous waste storage facilities without "articulating specific health and safety concerns" to support such a

policy, the ordinance frustrated RCRA's waste treatment research, development, and demonstration program objectives as well as RCRA's general objective to facilitate treatment in place of land disposal. *Id.* The *Ogden* court focused on the absence of specific standards in the ordinance and the absence of specific findings by the City supporting its local interests. *Id.* at 1446-47. Because San Diego "councilmembers did not articulate any specific health, safety or environmental concerns" to justify the local program, the court concluded that the City's denial of a hazardous waste treatment permit was impermissible under federal preemption principles. *Id.* at 1446-48. However, the court did not preclude the possibility that an ordinance with express guidelines tailored to address reasonable local conditions, and supported by legitimate findings of fact to justify the action denying the conditional use permit, might have survived federal preemption scrutiny. *Id.*

By contrast, the court in *LaFarge* upheld a local ordinance prohibiting a cement plant from burning HWFs if the plant is located within one-half mile of a residence. *LaFarge*, 813 F.Supp. at 508-12. The court concluded that the ordinance was a reasonable response to safety concerns that might arise from spills and did not amount to a complete ban on such activity. Hence, it fell within the range of local ordinances allowed under § 6929. As in *Ogden*, however, the court's preemption analysis turned in part on the rationality of Texas' purposes underlying its more stringent site requirements. *Id.* at 508-11.

Similarly, the court in *Upjohn* upheld a municipal ordinance requiring the storage of waste in an enclosed structure unless the zoning commission approves the site plan after considering the activity's impact on public health, safety, sanitation, and aesthetics. \*1508 *Upjohn*, 753 F.Supp. at 430-31. The court conducted an extensive review of how the local measure affected the implementation of RCRA and, specifically, whether it frustrated Congress' goals and purposes. See also *Old Bridge Chemicals*, 965 F.2d at 1296 (upholding New Jersey regulation requiring transporters of recyclable hazardous waste to label and identify the waste); *Hunt v. Chemical Waste Management, Inc.*, 584 So.2d 1367, 1381-82 (Ala.1991) (upholding Alabama's "Cap" provision, limiting the amount of hazardous waste that can annually be disposed of at certain commercial facilities, because it "is consistent with what the Congress had in mind when passing RCRA—reducing the amount of landfilled waste—and furthers, rather than frustrates the purpose of RCRA"), *rev'd on other grounds*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992).

[7] [8] [9] We draw from these cases several principles that

inform our preemption analysis under RCRA. First, ordinances that amount to an explicit or de facto total ban of an activity that is otherwise encouraged by RCRA will ordinarily be preempted by RCRA.<sup>1100</sup> *ENSCO*, 807 F.2d at 745; *Ogden*, 687 F.Supp. at 1446–47; *Jacksonville*, 824 S.W.2d at 842; *Rollins*, 371 So.2d at 1132. Second, an ordinance that falls short of imposing a total ban on encouraged activity will ordinarily be upheld so long as it is supported by a record establishing that it is a reasonable response to a legitimate local concern for safety or welfare. *LaFarge*, 813 F.Supp. at 508–12; *Upjohn*, 753 F.Supp. at 431; *Old Bridge Chemicals*, 965 F.2d at 1296–97. Significant latitude should be allowed to the state or local authority. However, if the ordinance is not addressed to a legitimate local concern, or if it is not reasonably related to that concern, then it may be regarded as a sham and nothing more than a naked attempt to sabotage federal RCRA policy of encouraging the safe and efficient disposition of hazardous waste materials.<sup>8</sup>

Consequently, some review of the local ordinance is required. In *ENSCO*, the Eighth Circuit suggested that the review focus on whether the local ordinance was a “good faith” adaptation of federal policy to local conditions. *ENSCO*, 807 F.2d at 745. The district court in our case picked up on that standard when it ruled that the Board’s Ordinance “can surely be viewed as a permissible ‘good faith adaptation of federal policy to local conditions.’ ” Order of August 4, 1992 at 7. However, it seems to us that the evaluation of the local ordinance should be conducted on an objective, rather than a subjective, basis. It is, after all, very difficult to determine the bona-fides of a collective legislative body where motivation may vary among the members of that body and where, in most cases, the motivations may be complex and easily disguised. Rather, we are on firmer footing if we utilize an objective approach, asking whether a legitimate local concern has been identified and whether the ordinance is a reasonable response to that concern. Of course, we must also examine \*1509 the impact of the local ordinance on the objectives of the federal statute because there can be no implied *Hines* preemption unless the local ordinance thwarts the federal policy in a material way.

<sup>1100</sup> In adopting an objective, rather than a subjective, analysis for our preemption review, we are following the lead of the United States Supreme Court. See *Gade*, 505 U.S. at —, 112 S.Ct. at 2387. In *Gade*, the Court considered whether the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (“OSH Act”), and federal regulations promulgated thereunder, preempted Illinois statutes requiring the licensing of workers at certain hazardous waste facilities. The Court concluded

that the OSH Act barred a State from “enfore[ing] its own occupational safety and health standards without obtaining the Secretary [of Labor’s] approval.” *Id.* at —, 112 S.Ct. at 2383. Absent the Secretary’s approval, the OSH Act “preempts all state ‘occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated.’ ” *Id.* at —, 112 S.Ct. at 2386 (quoting 29 U.S.C. § 667(b)). Conceding that it had not obtained the Secretary’s approval, the Illinois Environmental Protection Agency nevertheless attempted to defend the state statutes against a federal preemption attack by arguing that the OSH Act loses its preemptive force “if the state legislature articulates a purpose other than (or in addition to) workplace health and safety.” *Id.* at —, 112 S.Ct. at 2386. The Court, however, flatly rejected this argument. “Whatever the purpose or purposes of the state law, preemption analysis cannot ignore the *effect* of the challenged state action on the preempted field.” *Id.* at —, 112 S.Ct. at 2387 (emphasis added). See also *Perez v. Campbell*, 402 U.S. 637, 651–52, 91 S.Ct. 1704, 1712, 29 L.Ed.2d 233 (1971):

We can no longer adhere to the aberrational doctrine ... that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law....

### C.

<sup>1111</sup> Guided by these federal preemption principles and our understanding of RCRA’s overall legislative scheme, we turn to the language of the Rogers County Ordinance at issue in this case. Section 3.13.2, as amended and entitled “Industrial Waste Disposal/Recycling/Treatment,” provides in pertinent part:

An Industrial Waste Disposal/Recycling/Treatment Site shall not be less than one hundred sixty (160) acres in size and no other industrial waste disposal/recycling/treatment site shall be nearer than one (1) mile (5,280 feet) in any direction from the proposed industrial waste disposal/recycling/treatment site. The site will be as nearly square as possible.

All operation of actual disposal/recycling/treatment site (sic) shall be confined to as near the center of the site as practical and in no case in violation of any Oklahoma State Department of Health Rules and Regulations or in violation of any other regulatory requirements. The operator of the ... site shall own in fee both the land (surface) and the minerals.

The operator shall file with the Planning Commission a comprehensive drainage spill protection plan which will clearly and specifically detail the permanent and emergency measures and permanent structures to be installed to protect the drainage area and all adjacent drainage areas from any contamination by industrial waste....

All industrial waste disposal/recycling/treatment sites shall be located a least one (1) mile from any platted residential subdivision.

Blue Circle contends that this Ordinance frustrates RCRA's objective to encourage resource \*1510 recovery and recycling because no landowner within the Commission's geographical jurisdiction can satisfy all the site location requirements. Blue Circle notes that there is no existing 160-acre plot in the county, situated in an industrially-zoned region, whose boundaries are at least one-mile from any platted residential area. The Board responds by identifying three sites that hypothetically could be rezoned to accommodate hazardous waste disposal, recycling, or treatment; however, Blue Circle retorts that these sites are presently zoned flood plain and are clearly unsuitable for the storage and burning of hazardous waste and that it is therefore inconceivable that the sites would be rezoned to permit such activity. The Board further argues that, because landowners enjoy the opportunity to seek a variance from the zoning requirements, the ordinance does not serve as an absolute ban on hazardous waste.

This exchange merely serves to highlight how inappropriate summary judgment was on this record. There is a serious dispute over whether this ordinance imposes a de facto ban on the burning of HWFs in Rogers County. Blue Circle represents that it submitted to the district court affidavits of three expert witnesses stating that the Ordinance's site requirements are unreasonable,

arbitrary and capricious, overbroad, unnecessary, and serve no rational purposes." In response, the Board merely rests on a hypothetical, standardless possibility that, notwithstanding the Ordinance's specific site requirements, the Board might relent and allow such activity in the future, either by rezoning flood plain land or by granting a variance. This is not a sufficient response. *See, e.g., Ogden*, 687 F.Supp. at 1446-48 (a standardless permit scheme amounted to a de facto ban). Further, there is nothing in the record identifying what specific safety or health hazards the Board believes would be presented if Blue Circle were to burn HWFs at its cement facility. Nor is there any evidence in the record suggesting that the limits imposed by the Ordinance—such as a one-mile buffer zone, the one-hundred-sixty acre minimum plot size, and the requirement that the site be as nearly square as possible—bear any reasonable relation to a legitimate local concern.<sup>10</sup>

In conclusion, this record is quite inadequate to support summary judgment for the Board on the preemption question. There is a genuine dispute concerning whether this Ordinance is a reasonable response to protect a legitimate local concern or whether it is really a sham, with the purpose and effect simply of frustrating the policy of RCRA to encourage the recycling of hazardous waste and the safe use of HWFs. On remand, the parties must be permitted to develop a factual record addressing these issues.

#### **IV. The Commerce Clause**

Blue Circle next alleges that the Ordinance violates the Commerce Clause of the U.S. Constitution by imposing an excessive burden on interstate commerce by effectively barring the use of HWFs within Rogers County.<sup>11</sup> The district court summarily rejected this challenge by concluding that the Ordinance promotes the health, safety, and welfare of the Rogers County community and is "devoid of economic animus toward out-of-state interests." Order of August 4, 1992 at 8.<sup>12</sup>

##### **\*1511 A.**

<sup>[12]</sup> <sup>[13]</sup> Blue Circle relies on "dormant" Commerce Clause principles in its attack on the Ordinance's constitutionality. The Commerce Clause not only expressly empowers Congress to regulate commerce

among the states, but it also impliedly confines the states' power to burden interstate commerce. *Oregon Waste Systems v. Dept. of Env. Quality*, 511 U.S. 93, —, 114 S.Ct. 1345, 1349, 128 L.Ed.2d 13 (1994). The "dormant" Commerce Clause operates in this latter capacity by denying "the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Id.*; *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, — — —, 114 S.Ct. 1677, 1682–83, 128 L.Ed.2d 399 (1994).<sup>13</sup>

The district court focused on that aspect of the dormant Commerce Clause that prohibits direct burdens on interstate commerce resulting from discrimination between local and interstate commerce. It is certainly true that a major part of the jurisprudence under the dormant Commerce Clause addresses discrimination against out-of-state commerce. *See, e.g., Oregon Waste Systems*, 511 U.S. at —, 114 S.Ct. at 1351; *Chemical Waste Management*, 504 U.S. at —, 112 S.Ct. at 2013–14. Indeed, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia*, 437 U.S. at 624, 98 S.Ct. at 2535 (citing as a prototypical example a state law that "overtly blocks the flow of interstate commerce at a State's borders"). "[S]uch facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Chemical Waste Management*, 504 U.S. at —, 112 S.Ct. at 2014 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337, 99 S.Ct. 1727, 1737, 60 L.Ed.2d 250 (1979)); *Wyoming v. Oklahoma*, 502 U.S. 437, — — —, 112 S.Ct. 789, 800–02, 117 L.Ed.2d 1 (1992) (deeming facially discriminatory an Oklahoma statute requiring coal-fired electric generating plants that produce power for sale in Oklahoma to burn a mixture of coal containing at least 10 percent Oklahoma-mined coal).

<sup>114</sup> <sup>115</sup> However, the dormant Commerce Clause also prohibits a state or local "statute [that] regulates evenhandedly to effectuate a legitimate local public interest" if it imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970); *see also C & A Carbone*, 511 U.S. at —, 114 S.Ct. at 1682 (explaining that the "two lines of analysis" under the dormant Commerce Clause consist of local measures that discriminate against interstate commerce and those that regulate evenhandedly but impose unreasonable burdens on interstate commerce). When interstate discrimination is not involved, we assess a dormant Commerce Clause challenge to a local measure under the *Pike* balancing test. Pursuant to the *Pike* test, "[i]f a legitimate local purpose is

found, then the question becomes one of degree." *Pike*, 397 U.S. at 142, 90 S.Ct. at 847. The extent of the burden on interstate commerce that will be tolerated will depend on the "nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*; *Philadelphia*, 437 U.S. at 624, 98 S.Ct. at 2535. Legislation pertaining to public safety has long been recognized as an important local interest. *Pike*, 397 U.S. at 143, 90 S.Ct. at 848; *Fort Gratiot*, 504 U.S. at —, 112 S.Ct. at 2027. Moreover, we have held that "the person challenging a statute that regulates evenhandedly bears the burden of showing that the incidental burden on interstate commerce is excessive compared to the local interest." *Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir.1992).

## B.

<sup>116</sup> The Rogers County hazardous waste zoning ordinance operates evenhandedly because \*1512 it does not distinguish between hazardous waste generated within the County and hazardous waste generated outside the county. Its site conditions apply equally, regardless of the origin of the HWFs being burned and it confers no advantages on in-state entities seeking to store, treat, recycle, or dispose of HWFs as against out-of-state firms. Consequently, we must apply the balancing test set forth in *Pike*, rather than the more strict test reserved for statutes that explicitly, or by application, discriminate based upon the origin of the article of commerce. *Dorrance*, 957 F.2d at 763 (applying *Pike* test to assess the constitutionality of Wyoming's ban on the private ownership of big or trophy game animals because the ban applied both to in-state and out-of-state residents); *Old Bridge Chemicals*, 965 F.2d at 1294 (*Pike* test applicable because New Jersey's hazardous waste transportation regulations applied "evenhandedly to in-state and out-of-state companies").

<sup>117</sup> The district court focused solely on the purported motives of the Rogers County Commissioners and concluded that there was no "economic animus toward out-of-state interests." Once it reached this conclusion, the court erred by bypassing the balancing analysis required by *Pike*. The court's exclusive focus on animus against interstate interests neglected completely the role of the dormant Commerce Clause in prohibiting unreasonable incidental burdens on interstate commerce, even when there is no discriminatory animus involved against interstate commerce. This broader analysis requires the court to scrutinize (1) the nature of the putative local benefits advanced by the Ordinance;<sup>14</sup> (2)

the burden the Ordinance imposes on interstate commerce;<sup>15</sup> (3) whether the burden is "clearly excessive in relation to" the local benefits; and (4) whether the local interests can be promoted as well with a lesser impact on interstate commerce. *Pike*, 397 U.S. at 142, 90 S.Ct. at 847. The record here is inadequate to support a summary judgment for the Board on the dormant Commerce Clause challenge to the Ordinance. The putative local interest here is the health and safety of the County's residents from HWFs and their by-products after combustion. However, the mere "incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670, 101 S.Ct. 1309, 1316, 67 L.Ed.2d 580 (1981) (plurality opinion).

Here, there is no evidence that the HWFs that Blue Circle proposes to burn, or the by-products of combustion of such HWFs, would present any significant health or safety hazard. There is no evidence that the Ordinance requirements are related in any reasonable way to any hazard that the HWFs might present. And, there is no evidence whether the County's local interest could be promoted as well in other ways with a lesser impact on interstate activity. Blue Circle represents, and the Board does not refute, that it presented evidence that the Ordinance's site requirements are excessive in relation to the putative local benefits. Not only did the court apparently fail to consider this evidence, but it also did not address the other factors in the *Pike* balancing test. Further, Blue Circle also suggests other evidence it would have introduced had it been given proper notice of the court's decision to enter summary judgment against it.

Because we conclude that the court erroneously failed to conduct the *Pike* analysis and Blue Circle has presented evidence creating material fact issues as to the Commerce Clause implications of the Ordinance, we reverse and remand for further proceedings consistent with this opinion.

#### **\*1513 V. State Law Claims**

Finally, Blue Circle appeals the district court's rejection of its state law challenges to the Ordinance. The court concluded that it would not be inequitable to subject Blue Circle to the amended Ordinance because Blue Circle did not enjoy a vested right in burning HWFs at its cement

plant before the Board amended § 3.13.2. On appeal, Blue Circle has abandoned its vested rights theory, opting instead to reformulate its argument to allege that the Board acted inequitably by amending the Ordinance specifically to thwart Blue Circle's HWFs project. In addition, Blue Circle alleges that the amendment constituted an unlawful exercise of the Board's zoning power. We will consider these claims in turn.

#### **A.**

<sup>118]</sup> Blue Circle contends that the Board acted inequitably by amending § 3.13.2 in direct response to Blue Circle's initial complaint seeking a declaratory judgment that the original version of § 3.13.2 did not apply to hazardous waste recycling and after the company had invested approximately \$200,000 in its HWFs conversion project. The district court concluded that, absent a vested right, Oklahoma law requires a court to apply the law in effect at the time of review.

The district court, and Blue Circle in its appeal, devote considerable attention to the applicability of an unpublished 1992 opinion by the Oklahoma Supreme Court. See *In re Julius Bankoff*, 1992 WL 131940 (Nos. 69586, 78146), (Okla. June 16, 1992) ("*Bankoff I*"). However, since the submission of briefs and oral argument in the instant case, *Bankoff I* has been withdrawn and superseded on rehearing by *In re Julius Bankoff*, 875 P.2d 1138 (Okla. 1994) ("*Bankoff II*").<sup>16</sup> *Bankoff II* has not yet been released for publication in the permanent law reports, and until it so released, it is subject to revision or withdrawal. Pursuant to Rule 1.200(B)(E) of the Oklahoma Rules of Appellate Procedure, "unpublished opinions are deemed to be without value as precedent ... [and] shall not be considered as precedent by any court or in any brief or other material presented to any court, except to support a claim of res judicata, collateral estoppel, or law of the case."

Were it not for *Bankoff II*, Blue Circle would have no authority for its claim that the County's amendment to its Ordinance constituted an inequitable and actionable abuse of government power. Because under Oklahoma law neither the district court nor our court may rely upon *Bankoff II* due to its present status as an unpublished opinion, we must disregard that authority.

Blue Circle cites no Oklahoma case, and we have found none, holding that a landowner acquires an accrued property or vested right in an existing zoning regulation

affecting his property. See *April v. Broken Arrow*, 775 P.2d 1347, 1352 (Okla.1989) (a landowner's "potential use of all property, under our system of government, is subordinate to the right of City's reasonable regulations, ordinances, and all similar laws....").

Even if we were to consider *Bankoff II*, we cannot say the district court in the instant case erred in finding Blue Circle's situation distinguishable. Blue Circle had not applied for a conditional use permit at the time of the \*1514 amendment and thus it was not, as of that time, entitled to convert to HWFs use even under the original version of the Ordinance.<sup>17</sup> Whereas the trial court in *Bankoff II* ruled that Bankoff had complied with the statutory requirements for a conditional use permit and had obtained approval from the State, Blue Circle has obtained no such ruling or approval. Although Blue Circle had incurred some engineering and planning costs, it had not commenced physical modifications to its plant.<sup>18</sup> Further, it is not evident from the record that Blue Circle's expenditures were undertaken in justifiable reliance upon the expectation that it would obtain approval under the original Ordinance. It is the Board's position that the amendment merely clarified the interpretation that it believed should have been accorded to its Ordinance all along. And, during Blue Circle's extended dispute with the Board, Blue Circle was clearly on notice that its right to convert its cement plant to HWFs use was being contested. Under these circumstances, we cannot disagree with the district court's conclusion that what is now the *Bankoff II* standard for an equity action against the Board was not met.<sup>19</sup>

Thus, we affirm the district court's grant of summary judgment in favor of the Board on this claim.

## B.

[19] [20] We turn finally to Blue Circle's allegation that the Board's amendment to § 3.13.2 constituted an unlawful exercise of police power. Blue Circle neither raised this issue in its amended complaint nor in its motion for summary judgment. In addition, the district court did not

consider the claim. The sole reference to this argument in the record on appeal appears in an unsigned proposed pretrial order that does not show that it was ever filed in the district court.<sup>20</sup>

Accordingly, we adhere to the well-established rule that we "will generally not address issues that were not considered and ruled upon by the district court." *Farmers Ins. Co. v. Hubbard*, 869 F.2d 565, 570 (10th Cir.1989). "Exceptions to this rule are rare and generally limited to cases where the jurisdiction of a court to hear a case is questioned, sovereign immunity is raised, or when the appellate court feels it must resolve a question to prevent a miscarriage of justice." *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir.1991). The rule is justified by: the unfairness that inures to the opponent if one party is allowed to argue an issue not raised before the trial court; the fact that such a practice would frequently require us to remand for additional evidence gathering and findings; the need for finality in litigation; \*1515 and conservation of judicial resources. *Id.* at 970-71.

Blue Circle's claim does not fit into the narrow exceptions to this general rule. We therefore decline to consider this attack on the Board's amendment to § 3.13.2.

## VI. Conclusion

We REVERSE the district court's order of summary judgment regarding Blue Circle's federal preemption and Commerce Clause challenges to the Rogers County Ordinance and REMAND for consideration. We AFFIRM the court's summary judgment in favor of the Board on Blue Circle's equity claim.

## Parallel Citations

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## Footnotes

<sup>1</sup> Underlying many of Blue Circle's issues is the complaint that the district court improperly converted the Board's motion to dismiss into one for summary judgment without affording Blue Circle notice or an adequate opportunity to present material facts in dispute. As our discussion of the RCRA preemption and Commerce Clause issues indicates, we conclude that because important factual issues remain unresolved, it was error to grant summary judgment in favor of the Board on these issues.

<sup>2</sup> By one estimate, at least twenty-three cement manufacturing plants in the United States and Canada operate with HWFs. *Apl't. App.* at 134. See *LaFarge Corp. v. Campbell*, 813 F.Supp. 501, 504 n. 5 (W.D.Tex.1993) (noting that HWFs are used in cement kilns,

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blast furnaces, coke ovens, sulfur recovery furnaces, and industrial boilers). Pursuant to 42 U.S.C. 6924(q)(1), Congress directed the Environmental Protection Agency ("EPA") to promulgate regulations to establish national standards for owners and operators of industrial furnaces that burn HWFs. *See* 40 C.F.R. § 266.100 Subpart H (entitled "Hazardous Waste Burned in Boilers and Industrial Furnaces").

3 The Supremacy Clause mandates that "the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

4 "[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985).

5 Section 6903(5) of RCRA defines the term "hazardous waste" as follows:

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

6 This provision mirrors clauses in the Clean Water Act, 33 U.S.C. § 1370, and the Clean Air Act, 42 U.S.C. § 7416, which likewise established the federal requirements as the floor for regulatory controls. *See, e.g., United States Steel Corp. v. Train*, 556 F.2d 822, 830 (7th Cir.1977) (Clean Water Act preserves for the States the right to impose limitations and standards more stringent than federal regulations promulgated under the Act).

7 We can, of course, envision situations where a total ban of such activity would not be preempted. For example, if the political entity consisted only of densely populated residential areas, and the hazardous waste activity in fact posed a significant threat to health or safety, a total ban could be upheld as a reasonable exercise of § 6929 delegation of authority to state and local authorities to adopt more stringent requirements, including regulations relating to site selection.

8 We note that our preemption analysis is similar to the EPA regulations governing the approval of State hazardous waste management programs under § 6926 of RCRA. 40 C.F.R. § 271.4. Pursuant to § 6926(b), "[t]he EPA may authorize states to 'carry out' their own hazardous waste programs 'in lieu of' RCRA and to 'issue and enforce permits for the storage, treatment, or disposal of hazardous waste' so long as the state program" is not inconsistent with the federal minimum standards. *United States v. State of Colorado*, 990 F.2d 1565, 1569 (10th Cir.1993) (quoting 42 U.S.C. § 6926(b)), *cert. denied*, 510 U.S. 1092, 114 S.Ct. 922, 127 L.Ed.2d 216 (1994). Section 271.4 of the EPA regulations define when a State program is not consistent with the federal program:

(a) Any aspect of the State program which *unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes* ... shall be deemed inconsistent.

(b) Any aspect of State law or of the State program which *has no basis in human health or environmental protections and which acts as a prohibition on the treatment, storage, or disposal of hazardous waste in the State* may be deemed inconsistent.

40 C.F.R. § 271.4 (emphasis added).

9 Because the Board does not dispute that this evidence was submitted to the district court, we accept Blue Circle's representation.

10 During discovery, Blue Circle requested the Board to identify any documents that address the "scope, necessity, or basis" for the Board's amendment to § 3.13.2. Board App. at 57. In response, the Board conceded that "[n]o such document exists." *Id.*

11 "The Congress shall have power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes [.]'" U.S. CONST. art. I, § 8, cl. 3.

12 There can be no doubt that hazardous waste is an article of commerce. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, —n. 3, 112 S.Ct. 2009, 2012 n. 3, 119 L.Ed.2d 121 (1992) ("The definition of 'hazardous waste' makes clear that it is simply a grade of solid waste, albeit one of particularly noxious and dangerous propensities."); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, —, 112 S.Ct. 2019, 2023, 119 L.Ed.2d 139 (1992) ("Solid waste, even if it has no value, is an article of commerce.").

13 The Supreme Court has affirmed that the dormant Commerce Clause applies not just to State-imposed discrimination against, or

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burdens on interstate commerce, but also to measures adopted by political subdivisions of the States that burden interstate commerce. *Fort Gratiot*, 504 U.S. at —, 112 S.Ct. at 2024.

14 As we have noted, health and safety interests are important local interests. *Pike*, 397 U.S. at 143, 90 S.Ct. at 848; *Fort Gratiot*, 504 U.S. at —, 112 S.Ct. at 2027.

15 See *Chemical Waste Management*, 504 U.S. at —, 112 S.Ct. at 2102; *Dorrance*, 957 F.2d at 764 (“[T]he Supreme Court has made clear that the extent of the burden on interstate commerce is a *key inquiry* under the *Pike* analysis.”) (emphasis added).

16 In *Bankoff II*, a landowner applied for a conditional use permit to develop a landfill. When the county board of adjustment denied Bankoff’s application, he appealed to the state district court. The district court reversed the board’s decision and the board appealed. With the appeal still pending, the county board of commissioners amended its zoning ordinance to provide that Bankoff’s proposed landfill project was no longer a permissible use. The Supreme Court of Oklahoma affirmed the district court’s judgment in favor of Bankoff on “equitable considerations.”

The Court expressly did not determine whether the Board acted in bad faith in adopting the amendment or whether Bankoff had a vested right to develop the landfill. Instead, the Court stated that “Bankoff had done everything legally required of him”: the State of Oklahoma had approved the proposal; the district court had concluded that he qualified for a conditional use permit; the Health Department had issued a permit; and he had spent \$800,000 on the project. The Court explained that “under the facts peculiar to this case it would be inequitable to give effect to the [zoning] amendment. *Our decision should be seen as a narrowly-constructed exception based strictly on equitable considerations given the facts peculiar to this case.*” *Bankoff II*, 875 P.2d at 1143 (emphasis added).

17 Blue Circle argues that it did not need to apply for a conditional use permit prior to filing suit challenging the validity of the zoning amendment because an application would have been futile. For this proposition, Blue Circle again relies exclusively on *Bankoff*, which stated that Oklahoma “law does not require one to do a vain or useless thing or to perform an unnecessary act to obtain relief to which one is otherwise clearly entitled.” *Bankoff*, 1992 WL 131940 at \*6 n. 15. However, in *Bankoff*, unlike here, the landowner had applied for a conditional use permit and the municipality denied it. Because the landowner in *Bankoff* unsuccessfully sought a conditional use permit, the court concluded that any effort to obtain a variance to the zoning amendment would have been futile. Footnote 15 in *Bankoff*, therefore, does not support Blue Circle’s reliance on the doctrine of futility.

18 We make this observation only to distinguish the facts of the instant case from those in *Bankoff II*. In so doing, we are not stating that planning and other preparatory costs could not, under some circumstances, be considered in determining whether it would be inequitable to apply an amended zoning ordinance to a landowner who incurred costs in pursuit of a project that was permissible under the pre-amendment version of the zoning ordinance.

19 *Bankoff II* suggested that an action alleging inequity against a zoning board for changing its zoning regulations after a landowner has complied with the existing law and has commenced construction in reliance upon its qualification under existing law, requires evidence of “bad faith, delaying tactics, prejudice, or reliance.” *Bankoff II*, 875 P.2d at 1142.

20 This Court ordinarily will decline to consider a claim in the absence of the appropriate documents in the record on appeal, since any discussion of such a claim would be speculation. *U.S. v. Vasquez*, 985 F.2d 491, 494 (10th Cir.1993). We have explained that the “appellant is responsible for insuring that all materials on which he seeks to rely are part of the record on appeal.” *Id.* at 495.

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27 Cal.4th 853  
Supreme Court of California.

GREAT WESTERN SHOWS, INC., Plaintiff and  
Respondent,  
v.  
COUNTY OF LOS ANGELES, Defendant and  
Appellant.

No. S091547. | April 22, 2002.

Operator of gun and collector shows sought preliminary injunction barring county from enforcing ordinance prohibiting the sale of firearms and ammunition on county property, alleging that ordinance violated First Amendment and was preempted by California gun control statutes, and also that county had no jurisdiction to legislate within bounds of an incorporated city. The United States District Court for the Central District of California granted injunction, and county filed interlocutory appeal. The United States Court of Appeals for the Ninth Circuit, 229 F.3d 1258, certified questions. The Supreme Court, Moreno, J., held that: (1) state law did not compel counties to allow their property to be used for gun shows at which guns and ammunition were sold, and (2) county could regulate the sale of firearms on its property located in a city when county ordinance did not conflict with city law.

Certified questions answered.

Brown, J., filed a dissenting opinion.

See also: 118 Cal.Rptr.2d 761, 44 P.3d 133.

West Headnotes (11)

- <sup>11]</sup> **Federal Courts**  
- - Proceedings following certification

Unresolved questions of whether state law regulating the sale of firearms and gun shows preempted municipal ordinance prohibiting gun and ammunition sales on county property and whether county, consistent with state Constitution, could regulate the sale of firearms on its property located in an incorporated city within the borders of the county were important

Next

and, thus, were properly certified by federal Court of Appeals. Cal.Rules of Court, Rule 29(a).

4 Cases that cite this headnote

- <sup>12]</sup> **Weapons**  
- - Power to regulate

Legislature preempted discrete areas of gun regulation rather than the entire field of gun control.

1 Cases that cite this headnote

- <sup>13]</sup> **Counties**  
- - Governmental powers in general  
**Weapons**  
- - Power to regulate

Statutes specifically pertaining to the regulation of gun shows did not expressly preempt county's regulation of gun shows on county property, but instead expressly contemplated that licensing of firearms dealers at gun shows would be subject to "all applicable local laws, regulations, and fees, if any" and referred to gun show vendors' acknowledgement of local laws dealing with the possession and transfer of firearms. West's Ann.Cal.Penal Code §§ 12071(b)(1)(B), 12071.4(b).

4 Cases that cite this headnote

- <sup>14]</sup> **Counties**  
- - Governmental powers in general  
**Weapons**  
- - Power to regulate

Possessing a gun on county property, as was prohibited by county ordinance, was not identical to the crime of selling an illegal assault

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weapon or handgun, nor was it a lesser included offense, such that someone could be lawfully convicted of both offenses and, thus, ordinance was not impliedly preempted on grounds that it was duplicative of state statutes. West's Ann.Cal.Penal Code §§ 12125(a), 12220, 12280(a)(1).

Cases that cite this headnote

[5]

**Counties**

- ~ Governmental powers in general

**Weapons**

- ~ Power to regulate

Although gun show statutes regulated, among other things, the sale of guns at gun shows, and therefore contemplated such sales, statutes did not mandate such sales; thus, ordinance limiting sales of guns on county property was not in direct conflict with, nor impliedly preempted by, statutes. West's Ann.Cal.Penal Code §§ 12071, 12071.1, 12071.4.

1 Cases that cite this headnote

[6]

**Counties**

- ~ Governmental powers in general

**Weapons**

- ~ Power to regulate

Regulation of gun show did not so fully and completely covered by general law as to clearly indicate that it had become exclusively a matter of state concern; legislature declined to preempt the entire field of gun regulation, instead preempting portions of it, such as licensing and registration of guns and sale of imitation firearms, nothing in state law impliedly forbid county from withdrawing its property from use as a venue for gun show sales, based on its own calculation of costs and benefits of permitting such use, and laws designed to control sale, use or possession of firearms in particular community had very little impact on transient citizens. West's Ann.Cal.Penal Code §§ 12071,

12071.1, 12071.4.

13 Cases that cite this headnote

[7]

**Counties**

- ~ Governmental powers in general

**Weapons**

- ~ Construction

County ordinance disallowing gun show sales on county property did not propose complete ban on gun shows within county and did not frustrate purposes of state gun show statutes, which appeared to be nothing more than to acknowledge that such shows take place and to regulate them to promote public safety. West's Ann.Cal.Penal Code §§ 12071, 12071.1, 12071.4.

5 Cases that cite this headnote

[8]

**Counties**

- ~ Governmental powers in general

**Weapons**

- ~ Power to regulate

County did not improperly relinquish its proprietary function over fairgrounds when it entered into a long-term lease with private corporation, such that county would be prohibited from imposing regulations on sales of guns on county property, which were more stringent than those set forth in state statutes; ordinance was not illegitimate exercise of county's power to make fundamental management decisions about how its property would be used.

1 Cases that cite this headnote

[9]

**Counties**

- ~ Governmental powers in general

**Weapons**

- ~ Power to regulate

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State gun show statutes did not mandate that counties use their property for such shows and, thus, if county allowed such shows, it could impose more stringent restrictions on the sale of firearms than state law prescribed. West's Ann.Cal.Penal Code §§ 12071, 12071.1, 12071.4.

Cases that cite this headnote

1101

**Counties**

- Governmental powers in general

**Weapons**

- Power to regulate

County could regulate the sale of firearms on its property located in an incorporated city within the borders of the county; by enacting ordinance that sought to regulate the use of its own property, but not the conduct generally of the citizens of city, county was not exercising regulatory jurisdiction that was coextensive with city, ordinance did not conflict with city law, and the violation of county ordinance was a misdemeanor. West's Ann.Cal.Gov.Code §§ 23004(d), 25132(a).

Cases that cite this headnote

1111

**Counties**

- Use of property

A county may regulate county property by ordinance as well as by contractual arrangement.

Cases that cite this headnote

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**Opinion**

MORENO, J.

We granted the request of the United States Court of Appeals for the Ninth Circuit for certification, pursuant to California Rules of Court, rule 29.5 to address the following questions.

1. Does state law regulating the sale of firearms and gun shows preempt a county ordinance prohibiting gun and ammunition sales on county property?

2. May a county, consistent with article XI, section 7 of the California Constitution, regulate the sale of firearms on its property located in an incorporated city within the borders of the county?

The first question may be rephrased as follows: Does state law *compel* counties to allow their property to be used for gun shows at which guns and ammunition are sold? We conclude that it does not.

We further conclude that a county may regulate the sale of firearms on its property located in a city when, as here, the county ordinance does not conflict with city law.

**I. CERTIFICATION**

Rule 29.5(f) of the California Rules of Court states: “The California Supreme Court shall have discretion to accept or **\*\*\*750** deny the request for an answer to [a] certified

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question of law. In exercising its discretion the court may consider: [¶] (1) factors that it ordinarily considers in deciding whether to grant review of a decision of a California Court of Appeal or to issue an alternative writ or other order in an original matter; [¶] (2) comity, and whether answering the question will facilitate the certifying court's functioning or help terminate existing litigation; [¶] (3) the extent to which an answer \*859 would turn on questions of fact; and [¶] (4) any other factors the court may deem appropriate."

[1] One of the principal grounds for granting review of Court of Appeal decisions is the "settlement of important questions of law." (Cal. Rules of Court, rule 29(a).) This case presents two such important questions that have been hitherto unresolved by this court or the Courts of Appeal: the ability of counties to restrict gun show operations on their property more stringently than does state law, and their ability to do so when the property in question is within the bounds of a city. It appears that the resolution of these questions is critical to the certifying court's resolution of the matter before it. Finally, although there are some qualifying factual circumstances to be considered, the questions presented are for the most part questions of law. Therefore, we concluded certification was appropriate.

## II. STATEMENT OF FACTS

The facts, as stated in the Ninth Circuit's certification order and from our own review of the record, are as follows:

Great Western Shows, Inc. (Great Western) operates three gun and collector shows a year at the Los Angeles County Fairgrounds (Fairgrounds) located in the City of Pomona. It had held shows there for the past 22 years, until the fall of 1999. The exhibitors at the show include sellers of antique (pre 1898) and modern firearms, ammunition, Old West memorabilia, and outdoor clothing.

The County of Los Angeles (County) owns the Fairgrounds, but has contracted with a separate entity, the Los Angeles County Fair Association (the Fair Association), entering into a 56 year lease. Prior to the show scheduled for October 1999, the County passed an ordinance entitled Prohibition on the Sale of Firearms and Ammunition on County Property (hereafter the Ordinance). \*\*124 The Ordinance reads: "The sale of firearms and/or ammunition on county property is prohibited." (Ord., L.A. County Code, ch. 13.67, § 13.67.030.) The Ordinance defines "sale" to include

"the act of placing an order." (*Id.*, § 13.67.040, subd. E.) The legislative findings accompanying the Ordinance recited the high incidence of gun-related deaths and injuries in the County and the relatively high frequency of illegal sales at gun shows contributing to such gun violence. (*Id.*, § 13.67.010.) Although the Ordinance applies to all County property, the County passed the law expressly to discourage Great Western's show, and the Fairgrounds is the only property at issue in this case.

To prevent the Ordinance's enforcement from interfering with its October 1999 show, Great Western brought suit against the County in the United \*860 States District Court for the Central District of California. Great Western filed for a preliminary injunction, arguing that the Ordinance infringes commercial speech in violation of the First Amendment to the United States Constitution. Great Western also challenged the Ordinance on the grounds that it is preempted by state gun control laws and that the County, under California law, has no jurisdiction to legislate inside city boundaries. The court granted the preliminary injunction. It found that "Great Western raised a substantial question regarding \*\*\*751 whether the Ordinance is preempted by state law and whether the County exceeded its lawful authority, and the balance of hardships tips decidedly in favor of Great Western." It did not reach Great Western's First Amendment claim.

The County then filed an interlocutory appeal in the Ninth Circuit, which subsequently certified to us the above questions.

## III. DISCUSSION

### *A. Does State Law Preempt the Greater Restriction of Gun and Ammunition Sales on County Property?*

#### **1. State Law Preemption in General and As Applied to Gun Control**

The general principles governing preemption analysis were summarized in *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 16 Cal.Rptr.2d 215, 844 P.2d 534 (*Sherwin-Williams Co.*), as follows:

"Under article XI, section 7 of the California Constitution, '[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.'

" 'If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.' [Citations.]

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[¶] ‘A conflict exists if the local legislation “ ‘duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.’ ” ‘ [Citations.] [¶] Local legislation is ‘duplicative’ of general law when it is coextensive therewith. [Citation.]

“Similarly, local legislation is ‘contradictory’ to general law when it is inimical thereto. [Citation.]

“Finally, local legislation enters an area that is ‘fully occupied’ by general law when the Legislature has expressly manifested its intent to ‘fully occupy’ the area [citation], or when it has impliedly done so in light of one \*861 of the following indicia of intent: ‘(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the’ locality. [Citations.]” (*Sherwin-Williams Co., supra*, 4 Cal.4th at pp. 897–898, 16 Cal.Rptr.2d 215, 844 P.2d 534, fn. omitted.)

<sup>12]</sup> A review of the gun law preemption cases indicates that the Legislature has preempted discrete areas of gun regulation rather than the entire field of gun control. The seminal case to advance this proposition is *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 76 Cal.Rptr. 642, 452 P.2d 930 (*Galvan*), in which this court considered a San Francisco gun law that required all firearms within San Francisco, with certain exceptions, to be \*\*125 registered. We observed that Penal Code section 12026, as it was written at the time, provided that “ ‘no permit or license to purchase, own, possess, or keep any [concealable] firearms at [the owner’s] place of residence or place of business shall be required....’ ” (*Galvan, supra*, 70 Cal.2d at p. 856, fn. 2, 76 Cal.Rptr. 642, 452 P.2d 930, italics omitted.) We distinguished between licensing, which signifies permission or authorization, and registration, which entails recording “ ‘formally and exactly’ ” (*id.* at p. 856, 76 Cal.Rptr. 642, 452 P.2d 930), and therefore declined to find express conflict between the statute and the \*\*\*752 ordinance. (*Id.* at pp. 856–859, 76 Cal.Rptr. 642, 452 P.2d 930.)

Neither did we find preemption by implication according to the three-part test discussed above, which had originally been articulated in *In re Hubbard* (1964) 62 Cal.2d 119, 41 Cal.Rptr. 393, 396 P.2d 809.

(*Sherwin-Williams Co., supra*, 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.) In *Galvan*, we found the San Francisco ordinance did not meet the first test, i.e., that the subject matter had been so fully and completely covered by general law as to clearly indicate that it had become exclusively a matter of state concern. (See *Sherwin-Williams Co., supra*, 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.) “Although [plaintiff] cites a great number of statutes relating to weapons, these statutes do not show that the entire area of gun or weapons control has been so fully and completely covered by general law ... ‘as to clearly indicate that [the subject] has become exclusively a matter of state concern.’ [Citation.] There are various subjects that the legislation deals with only partly or not at all.... [¶] Further, there are some indications that the Legislature did not believe that it had occupied the entire field of gun or weapons control. Thus, the Legislature has expressly prohibited requiring a license to keep a concealable weapon at a residence or \*862 place of business. (Pen.Code, § 12026.) Such a statutory provision would be unnecessary if the Legislature believed that all gun regulation was improper.” (*Galvan, supra*, 70 Cal.2d at p. 860, 76 Cal.Rptr. 642, 452 P.2d 930.)

Nor did we find the San Francisco ordinance preempted under the second test, i.e., partial coverage by general law couched in such terms as to indicate clearly that a paramount state concern would not tolerate further or additional local action: “The issue of ‘paramount state concern’ also involves the question ‘whether substantial, geographic, economic, ecological or other distinctions are persuasive of the need for local control, and whether local needs have been adequately recognized and comprehensively dealt with at the state level.’ [Citation.] [¶] That problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority....” (*Galvan, supra*, 70 Cal.2d at pp. 863–864, 76 Cal.Rptr. 642, 452 P.2d 930.)

As for the third test of implied preemption, we found “that the San Francisco gun law places no undue burden on transient citizens.... The law, applicable to firearms possessed by persons in San Francisco, provides for a seven-day exemption and thus excludes those transients who might otherwise be burdened. [¶] The law ... interferes less with transients than, for example, the Fresno ordinance prohibiting the consumption of alcoholic beverages on the street [citation], the Los Angeles gambling ordinance [citation], or the Los Angeles loitering ordinance [citation]—all of which were found not preempted by state law, and all of which apply to anyone within the geographic confines of the city, and

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not merely to residents.” (*Galvan, supra*, 70 Cal.2d at pp. 864–865, 76 Cal.Rptr. 642, 452 P.2d 930, italics & fn. omitted.) We concluded that the San Francisco registration law was not preempted by state law. (*Id.* at p. 866, 76 Cal.Rptr. 642, 452 P.2d 930.)

As was recognized in *Olsen v. McGillicuddy* (1971) 15 Cal.App.3d 897, 93 Cal.Rptr. 530 (*Olsen*), the Legislature’s response to *Galvan* was to adopt former Government Code section 9619, the predecessor to current Government Code section 53071, which made clear an “intent ‘to occupy the whole field of registration or licensing of ... firearms.’ ” (*Olsen, supra*, 15 Cal.App.3d at p. 902, 93 Cal.Rptr. 530, italics omitted.) Noting *Galvan*’s strong statement concerning the narrowness **\*\*126** of state law firearms preemption, the *Olsen* court found the Legislature’s limited response **\*\*\*753** to *Galvan* to be significant: “Despite the opportunity to include an expression of intent to occupy the entire field of firearms, the legislative intent was limited to registration and licensing. We infer from this limitation that the Legislature did not intend to exclude [localities] from enacting further legislation concerning the use of **\*863** firearms. [¶] It also does not appear that the adverse effect of a local ordinance on transient citizens of the state outweighs the possible benefit to the [locality].” (*Ibid.*, italics omitted.) The *Olsen* court thus concluded that a Petaluma ordinance that prohibited a parent having care of a minor to permit the minor to possess or fire a BB gun was not preempted by state gun laws.

As pointed out in *California Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1315, 78 Cal.Rptr.2d 591: “In response to *Olsen*, the Legislature enacted Government Code section 53071.5 ... which expressly occupies the field of the manufacture, possession, or sale of *imitation* firearms.<sup>1</sup> Thus once again the Legislature’s response was measured and limited, extending state preemption into a new area in which legislative interest had been aroused, but at the same time carefully refraining from enacting a blanket preemption of all local firearms regulation.” (Italics added.) As the court further explained: “This statute is expressly limited to imitation firearms, thus leaving real firearms still subject to local regulation. The express preemption of local regulation of sales of imitation firearms, but not sales of real firearms, demonstrates that the Legislature has made a distinction, for whatever policy reason, between regulating the sale of real firearms and regulating the sale of imitation firearms.” (*California Rifle & Pistol Assn., supra*, 66 Cal.App.4th at p. 1312, 78 Cal.Rptr.2d 591, italics omitted.) The court accordingly upheld a municipal ordinance banning the sale of so-called “Saturday Night

Specials.” (*Id.* at pp. 1308–1309, 1331–1332, 78 Cal.Rptr.2d 591; see also *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1118–1119, 67 Cal.Rptr.2d 420 [upholding city’s ability to confine firearms dealerships to certain commercially zoned areas but striking down provision regarding firearms storage covered by the detailed provisions of Pen. Code § 12071, subd. (b)(14)].)

On the other hand, a restrictive San Francisco firearm ordinance was held to be preempted in *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509, 186 Cal.Rptr. 380 (*Doe*). The ordinance outlawed the possession of handguns within the city but exempted those persons who obtained a license to carry a concealed weapon under Penal Code section 12050. Reviewing *Galvan* and *Olsen*, the court acknowledged that “these decisions suggested the Legislature has not prevented local government **\*864** bodies from regulating all aspects of the possession of firearms.” (*Doe, supra*, 136 Cal.App.3d at p. 516, 186 Cal.Rptr. 380.) Nonetheless, the ordinance directly conflicted with Government Code section 53071 and Penal Code section 12026, the former explicitly preempting local licensing requirements, the latter exempting from licensing requirements gun possession in residences and places of **\*\*\*754** business. Thus, the effect of the San Francisco ordinance “is to create a new class of persons who will be required to obtain licenses in order to possess handguns” in residences and places of business (*Doe, supra*, 136 Cal.App.3d at p. 517, 186 Cal.Rptr. 380), which the two statutes forbid (*id.* at pp. 517–518, 186 Cal.Rptr. 380).

In sum, a review of case law and the corresponding development of gun control statutes in response to that law demonstrates that the Legislature has chosen not to broadly preempt local control of firearms but has targeted certain specific areas for preemption. With this framework in mind, we turn **\*\*127** to California law regulating gun shows to determine whether and to what extent the Legislature has preempted this area of the law.

## **2. State Law Preemption of Laws Regulating Gun Shows**

The Legislature has enacted several statutes specifically pertaining to the regulation of gun shows. Penal Code section 12071, which concerns the licensing of retail firearms dealers and mandates a 10–day waiting period for the purchase of firearms, provides that, with certain exceptions, the firearms retail business “shall be conducted only in the buildings designated in the license.” (§ 12071, subd. (b)(1)(A).) One of those exceptions, found in subdivision (b)(1)(B), is for gun shows: “A

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person licensed pursuant to [this section] may take possession of firearms and commence preparation of registers for the sale, delivery, or transfer of firearms at gun shows or events, ... if the gun show or event is not conducted from any motorized or towed vehicle. A person conducting business pursuant to this subparagraph shall be entitled to conduct business as authorized herein at any gun show or event in the state without regard to the jurisdiction within this state that issued the license pursuant to [this section], provided the person complies with (i) all applicable laws, including, but not limited to, the waiting period specified in subparagraph (A) of paragraph (3), and (ii) *all applicable local laws, regulations, and fees, if any.*” (Italics added.)

Penal Code section 12071.1 also regulates gun shows in a number of ways. It provides that “[n]o person shall produce, promote, sponsor, operate, or otherwise organize a gun show event ... unless the person possesses a valid certificate of eligibility from the Department of Justice.” (*Id.*, subd. (a).) Certification requires the applicant to furnish pertinent information and **\*865** liability insurance. Gun show producers are also required to give law enforcement agencies a list of persons and organizations that rent space at the gun shows and provide other information to the Department of Justice and law enforcement agencies. (*Id.*, subds.(f), (g) and (h).) Producers are also required to inform prospective gun show vendors of various statutory requirements (*id.*, subd. (j)) and to post signs at the public entrances informing the public of the basic gun show rules. (*id.*, subd. (o ).) Section 12071.1 contains various other such provisions and penalties for violation of regulations.

Penal Code section 12071.4 requires among other things (1) that gun show or event vendors certify that no prohibited weapons will be displayed or sold, that there will be no incitement to hate crimes, that the firearms at the show are unloaded, and that they acknowledge and are responsible for complying with “all applicable federal, state, and *local* laws dealing with the possession and transfer of firearms” (*id.*, subd. (b), italics added); (2) that vendors provide certain information to gun show producers and wear name tags (*id.*, subds. (e) and (f)); and (3) that there be no firearms transfers between private parties unless conducted through a licensed **\*\*\*755** dealer in accordance with applicable state and federal laws. (*id.*, subd. (j).)

<sup>[3]</sup> Applying the preemption analysis set forth above, we first observe that there is no express preemption with regard to the regulation of gun shows. On the contrary, Penal Code section 12071, subdivision (b)(1)(B), expressly contemplates that licensing of firearms dealers

at gun shows will be subject to “all applicable local laws, regulations, and fees, if any” and Penal Code, section 12071.4, subdivision (b), refers to gun show vendors’ acknowledgement of local laws dealing with the possession and transfer of firearms.

<sup>[4]</sup> As for implied preemption, we note first of all that the Ordinance is not duplicative of state statutes. Great Western contends that the Ordinance overlaps several statutory provisions, including those prohibiting the sale of machine guns (Pen.Code, § 12220), assault weapons (*id.*, § 12280, subd. (a)(1)) and unsafe handguns (*id.*, § 12125, subd. (a)), and is therefore preempted. We disagree. The Ordinance prohibits and punishes as a misdemeanor “the sale of firearms and/or ammunition on County property.” (Ord., L.A. County Code, ch. 13.67, § 13.67.030.) The above statutes prohibit the sale of certain dangerous firearms. Thus, the Ordinance does not criminalize “ ‘precisely **\*\*128** the same acts which are ... prohibited’ ” by statute (*Pipoly v. Benson* (1942) 20 Cal.2d 366, 370, 125 P.2d 482) and is therefore not duplicative. (Cf. *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 292, 219 Cal.Rptr. 467, 707 P.2d 840 [discrete portions of **\*866** ordinance criminalizing exactly the same conduct as statute duplicative of and preempted by state law].) Put another way, possessing a gun on county property is not identical to the crime of selling an illegal assault weapon or handgun, nor is it a lesser included offense, and therefore someone may be lawfully convicted of both offenses. (See *People v. Ortega* (1998) 19 Cal.4th 686, 692, 80 Cal.Rptr.2d 489, 968 P.2d 48.)

<sup>[5]</sup> Nor is there a direct conflict between the statute and the Ordinance. The Ordinance does not mandate what state law expressly forbids, nor does it forbid what state law expressly mandates. (See, e.g., *Doe, supra*, 136 Cal.App.3d 509, 186 Cal.Rptr. 380 [local law may not impose additional licensing requirements when state law specifically prohibits such requirements]; *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 223 Cal.Rptr. 609 [local ordinance banning electroshock therapy conflicts with state statutes mandating patients be given the choice to have such therapy].) Although the gun show statutes regulate, among other things, the sale of guns at gun shows, and therefore contemplate such sales, the statutes do not mandate such sales, such that a limitation of sales on county property would be in direct conflict with the statutes.

<sup>[6]</sup> The real question, then, is whether the Legislature intended to occupy the field of gun show regulation. Employing the three-part test discussed above, we answer the first question—whether gun show regulation “ ‘has

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been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern' ” (*Sherwin-Williams Co.*, *supra*, 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534)—in the negative. As the above case law demonstrates, the Legislature has declined to preempt the entire field of gun regulation, instead preempting portions of it, such as licensing and registration of guns and sale of imitation firearms. Nor has it preempted the field of gun show regulation, making the conduct of business at such shows subject to “applicable local laws.” (Pen.Code, § 12071, subd. (b)(1)(B); see also *id.*, § 12071.4, subd. (b)(2).)

\*\*\*756 Second, we find that gun show regulation has not “ ‘been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action.’ ” (*Sherwin-Williams Co.*, *supra*, 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.) The two subdivisions mentioned above expressly anticipate the existence of “applicable local laws.” (Pen.Code, § 12071, subd. (b)(1)(B); *id.*, § 12071.4, subd. (b)(2).) In addition, we are reluctant to find such a paramount state concern, and therefore implied preemption, “when there is a significant local interest to be served that may differ from one locality to another.” \*867 (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707, 209 Cal.Rptr. 682, 693 P.2d 261.) It is true today as it was more than 30 years ago when we stated it in *Galvan*, “[t]hat problems with firearms are likely to require different treatment in San Francisco County than in Mono County.” (*Galvan*, *supra*, 70 Cal.2d at p. 864, 76 Cal.Rptr. 642, 452 P.2d 930.) “[T]he need for the regulation or prohibition of the carrying of deadly weapons, even though not concealed, may be much greater in large cities, where multitudes of people congregate, than in the country districts or thinly settled communities, where there is much less opportunity and temptation to commit crimes of violence for which such weapons may be used.” (*People v. Commons* (1944) 148 P.2d 724, 64 Cal.App.2d Supp. 925, 932.)

Thus, the costs and benefits of making firearms more available through gun shows to the populace of a heavily urban county such as Los Angeles may well be different than in rural counties, where violent gun-related crime may not be as prevalent. The legislative findings of the Ordinance reveal the grave problems that prompted its passage. According to these findings, in 1997 there were 1,385 firearm deaths in Los Angeles County and 2,651 hospitalizations for nonfatal firearm injuries. These figures included 271 young people age 19 or younger killed \*\*129 by firearms and 839 hospitalized for firearm-related injuries. (Ord., L.A. County Code, ch. 13.67, § 13.67.010.) The legislative findings further state

that the widespread availability of illegally obtained firearms greatly contributed to the number of shooting incidents across the County, and that a “sting” operation conducted by the state Department of Justice uncovered significant illegal gun trafficking at the Great Western show held at the Fairgrounds. We perceive nothing in state law that impliedly forbids a county from withdrawing its property from use as a venue for gun show sales based on its own calculation of the costs and benefits of permitting such use.

As for the third test, we agree with previous cases that “[l]aws designed to control the sale, use or possession of firearms in a particular community have very little impact on transient citizens, indeed, far less than other laws that have withstood preemption challenges.” (*Suter v. City of Lafayette*, *supra*, 57 Cal.App.4th at p. 1119, 67 Cal.Rptr.2d 420; *Galvan*, *supra*, 70 Cal.2d at pp. 864–865, 76 Cal.Rptr. 642, 452 P.2d 930.)

<sup>17</sup> But the conclusion that the Legislature has chosen not to preempt the field of gun show regulation does not end the matter. Great Western argues that although the gun show statutes provide for some local regulation of gun shows—for example, subjecting the location of gun shows to County zoning ordinances—the Ordinance at issue in this case goes too far. It cites certain cases interpreting the federal Resource Conservation and Recovery Act (RCRA) (42 U.S.C. §§ 6901–6991) in which local regulation is contemplated by statute but in which a total ban on the activity regulated—that is, \*868 on hazardous waste \*\*\*757 disposal and recycling—is not permitted. (*Blue Circle Cement, Inc. v. Board of County Commissioners* (10th Cir.1994) 27 F.3d 1499, 1506–1507; *ENSCO v. Dumas* (8th Cir.1986) 807 F.2d 743, 744–745; *Ogden Environmental Services v. City of San Diego* (S.D.Cal.1988) 687 F.Supp. 1436, 1446–1447; see also *South Dakota Mining Assn. v. Lawrence County* (8th Cir.1998) 155 F.3d 1005, 1009–1010.)

In *Blue Circle Cement, Inc. v. Board of County Commissioners*, *supra*, 27 F.3d at pages 1506–1507, for example, the court considered an ordinance that appeared to grant unlimited discretion to local authorities to deny authorization of industrial waste disposal and treatment facilities within the county that could result in a de facto ban on such facilities. The court noted that the RCRA, 42 United States Code section 6901 et seq., has as one of its main purposes to “enlist[ ] the states and municipalities to participate in a ‘cooperative effort’ with the federal government to develop waste management practices that facilitate the recovery of ‘valuable materials and energy from solid waste.’ 42 U.S.C. § 6902(a)(11).” (27 F.3d at p. 1506.) The court concluded that the RCRA did not

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permit “an explicit or de facto ban of an activity” encouraged by the statute, but allowed “an ordinance that falls short of imposing a total ban on encouraged activity ... so long as it is supported by a record establishing that it is a reasonable response to a legitimate local concern for safety or welfare.” (*Id.* at p. 1508.)

Thus, *Blue Circle Cement, Inc.* and related cases cited by Great Western stand broadly for the proposition that when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the statute’s purpose. These cases are therefore distinguishable from the present one in at least two respects: First, unlike the RCRA, there is no evidence either in the gun show statutes or, as far as we can determine, in their legislative history, that indicates a stated purpose of promoting or encouraging gun shows. Rather the overarching purpose of Penal Code sections 12071, 12071.1, and 12071.4 appears to be nothing more than to acknowledge that such shows take place and to regulate them to promote public safety.

Second, the Ordinance does not propose a complete ban on gun shows within the County, but only disallows gun show sales on County property. Even assuming arguendo that a county is prevented from instituting a general ban on gun shows within its jurisdiction, it is nonetheless empowered to ban such shows on its own property. **\*\*130 \*869** Government Code section 23004, subdivision (d), gives a county the authority to “[m]anage, sell, lease, or otherwise dispose of its property as the interests of its inhabitants require.” (See also Gov.Code, §§ 25900 25908 [giving counties authority over the use of their fairgrounds].) To “manage” property must necessarily include the fundamental decision as to how the property will be used. It is true that the County delegated in part its management of the Fairgrounds to a private corporation via a long-term lease. The terms of the lease limit to some degree the County’s management discretion. But it cannot be doubted that the County has the continuing authority, to the extent consistent with its legitimate contractual obligations, to make decisions about how its property will be used pursuant to Government Code section 23004, subdivision (d). It may exercise that discretion through ordinances as well as through contractual agreements. (See *Air Cal v. City and County of San Francisco* (9th Cir.1989) 865 F.2d 1112, 1117; *Santa Monica Airport Assn. v. City of Santa Monica* (9th Cir.1981) 659 F.2d 100, 101, 104–105.) None of the gun show statutes reviewed above impliedly seek to override the discretion a county retains in the use of its property.

<sup>181</sup> Great Western argues that this discretion only comes into play when the County acts as a proprietor rather than as a regulator, citing federal preemption cases regarding municipal airport regulation that found the proprietor/regulator distinction significant. (*Air Cal v. City and County of San Francisco*, *supra*, 865 F.2d 1112; *Pirollo v. City of Clearwater* (11th Cir.1983) 711 F.2d 1006.) In *Pirollo*, the court considered a suit by an airport lessee against the city that owned a municipal airport challenging a city ordinance that banned night flying into the airport. The court concluded that the Federal Aviation Act (FAA) preempted the city’s authority to impose such a curfew. The court suggested, based on case law interpreting a portion of the FAA, that a municipality may have more latitude to set curfews on jet flights if it is acting solely in a proprietary capacity as owner of the airport rather than as regulator. But the court concluded that because the city had contracted away its proprietary power with a lease, it was acting as a regulator rather than a proprietor. (*Pirollo*, *supra*, 711 F.2d at p. 1010.) Great Western argues that the County in essence relinquished its proprietary function over the Fairgrounds when it entered into a long-term lease with a private corporation and therefore may not impose regulations more stringent than are set forth in state statutes.

While the proprietor/regulator distinction may have special significance in the heavily regulated realm of airport management, we do not find such significance here. Rather, the question is whether the County entirely contracted away its management discretion under **\*870** Government Code section 23004, subdivision (d), such that when it acted to ban gun show sales on its property it violated its contractual obligations. There is no evidence that it has done so. The ground lease and operating agreement between the County and the Fair Association, at paragraph 5.01, provides simply that the Fair Association will use the property “to operate the Fair and Interim Events” pursuant to various terms and conditions. Paragraph 5.05 forbids the Fair Association from violating “any law, ordinance or regulation applicable to” the Fairgrounds. Furthermore, as Great Western acknowledges, the County renegotiated the lease with the Fair Association, reducing its rental obligations to the County in light of the loss of gun show revenue. Unlike in *Pirollo*, in which the airport lessee complained of the interference of the municipal lessor, the Fair Association is not a party to this case and does not contend the County has violated its contractual obligations by enacting the Ordinance. In short, there is no merit to the argument that the Ordinance was an illegitimate exercise of the County’s power to make fundamental management decisions about how its property would be used.

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<sup>191</sup> Thus, a county has broad latitude under Government Code section 23004, subdivision (d), to use its property, consistent with its contractual obligations, “as the interests of its inhabitants require.” Aside from First Amendment public forum considerations or special statutory requirements not before us, the County is not compelled to grant access to its property to all comers. Nor do the **\*\*131** gun show statutes mandate that counties use their property for such shows. If the County does allow such shows, it may impose more stringent restrictions on the sale of firearms than state law prescribes.

**\*\*\*759** For all the above reasons, we conclude that the Ordinance is not preempted by the sale of firearms and/or ammunition on County property. We do not decide whether a broader countywide ban of gun shows would be preempted.

***B. May a County Regulate the Sale of Firearms on Its Property Located Within the Borders of a City?***

<sup>190</sup> In formulating this question, the Ninth Circuit cited several cases that appeared to put the answer in doubt. In *Ex parte Pfirrmann* (1901) 134 Cal. 143, 66 P. 205, the plaintiff, a resident of the City of Los Angeles, challenged the County’s ability to subject him to liquor licensing requirements in addition to the city’s requirements. As the court stated, quoting *Ex parte Roach* (1894) 104 Cal. 272, 277, 37 P. 1044: “ ‘It is not to be supposed that it was the intention of the people, through their constitution, to **\*871** authorize a county to exercise the same power within the territory of the city as the city itself could exercise, or to confer upon the county the right to interfere with or impair the effect of similar legislation by the city itself.’ ... ‘... By the organization of a city within the boundaries of a county, the territory thus organized is *withdrawn* from the legislative control of the county upon the designated subjects, and is placed under the legislative control of its own council; and the principle of local government which pervades the entire instrument is convincible of the intention to withdraw the city from the control of the county, and to deprive the county of any power to annul or supersede the regulations of the city upon the subjects which have been confided to its control.’ It is claimed upon the part of respondent, that *Ex parte Roach*, 104 Cal. [at] 277, [37 P. 1044] only goes to the extent of holding that where a conflict arises between the respective regulating ordinances of a county and municipality, that then, in such a case, the ordinance of the municipality within its jurisdiction is controlling.... But ... it has a much broader meaning.... If for no other reason, the unfortunate results which would necessarily follow from a judicial holding that the powers of counties and municipalities

derived from the constitution as to the enactment of police and sanitary measures within the municipality were *concurrent*, justified the conclusion declared in *Ex parte Roach*, 104 Cal. [at] 277 [37 P. 1044].” (*Ex parte Pfirrmann*, *supra*, 134 Cal. at p. 145, 66 P. 205, italics added.)

Similarly, in *In re Knight* (1921) 55 Cal.App. 511, 203 P. 777, the court struck down a county ordinance enforcing the Volstead Act within the City of Oroville. “[W]hen a municipal corporation is organized within the limits of a county, then so much of the territory of such county as is comprehended within the municipal limits of such corporation is, so far as local government is concerned, withdrawn from the county, and any ordinances passed by the latter can have no binding or any force upon the municipality as to any matters or subjects as to which the latter is vested with the power to enact prohibitory or regulatory local laws.” (*Id.* at p. 518, 203 P. 777, italics omitted.)

*Pfirrmann* and *Knight* establish the principle that cities and counties generally speaking do not exercise concurrent jurisdiction over regulatory matters. But in this case the County is not seeking to exercise concurrent jurisdiction. As discussed above, Government Code section 23004, subdivision (d), authorizes the County to manage its own property, and that includes deciding how the property may be used, whether that decision is embodied in a contract with a private party, in an ordinance, or in some combination of the two. The City of Pomona does not and may not dictate how the County uses its **\*\*\*760** property. (See **\*872** *Hall v. City of Taft* (1956) 47 Cal.2d 177, 302 P.2d 574 [school district need not obtain city building permits for “sovereign activities” such as the construction and maintenance of its buildings]; *County of Los Angeles v. City of Los Angeles* (1963) 212 Cal.App.2d 160, 167, 28 Cal.Rptr. 32 [applying same principle to counties].) By enacting an ordinance that seeks to regulate the use of its own property, but not the **\*\*132** conduct generally of the citizens of Pomona, the County is not exercising regulatory jurisdiction that is coextensive with Pomona.

Nor does County law conflict with Pomona law. No Pomona law mandates that the County use its property for gun shows, nor could it. Absent an actual conflict between city and county law, or an exercise in concurrent jurisdiction, the County’s legislation concerning the use of its property cannot be regarded as an unlawful extraterritorial act.

Amicus curiae Gun Owners of California argues that while the County may be able as a property owner to

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prohibit firearms sales on its property, it does not have the authority to criminalize activity on its property within the City of Pomona. Thus, amicus curiae argues the County may not, as it has done here, establish ordinances on its extraterritorial property the violation of which constitutes a misdemeanor.

<sup>[11]</sup> This argument misses the mark. When the County acts pursuant to Government Code section 23004, subdivision (d), it is acting for the “benefit of its inhabitants.” Therefore, although it is acting in some sense as a property owner, it is in another sense acting as a governmental entity. It may regulate property by ordinance as well as by contractual arrangement. (See *Air Cal v. City and County of San Francisco*, *supra*, 865 F.2d at p. 1117; *Santa Monica Airport Assn. v. City of Santa Monica*, *supra*, 659 F.2d at pp. 104–105.) Given that it may draft ordinances governing the use of its property, even extraterritorial use, and given that the violation of a County ordinance is a misdemeanor (Gov.Code, § 25132, subd. (a)), there is no reason why the Ordinance cannot be enforced on the County’s extraterritorial property. (See 74 Ops.Cal.Atty.Gen. 211 (1991) [county may enforce ordinance banning smoking in its buildings, with violations punishable as a misdemeanor, although some of the buildings are within the bounds of a city].)

In sum, the County has authority to enact the Ordinance, notwithstanding the fact that the Ordinance affects County property within the City of Pomona.

#### IV. CONCLUSION

We therefore conclude that:

**\*873** 1. State law does not preempt a county ordinance prohibiting gun and ammunition sales on county property.

2. A county may regulate the sale of firearms on its property located in an incorporated city within the borders of the county.

WE CONCUR: GEORGE, C.J., and KENNARD, BAXTER, WERDEGAR and CHIN, J.

Dissenting Opinion by BROWN, J.

By enacting an ordinance prohibiting the sale of firearms on county property (L.A. County Code, ch. 13.67, §

13.67.030)

and enforcing the ordinance with respect to the Los Angeles County Fairgrounds, Los Angeles County seeks to regulate affairs within the City of Pomona, an incorporated city. It cannot do so. (Cal. Const., art. XI, § 7; *In re Knight* (1921) 55 Cal.App. 511, 517–518, 203 P. 777; *Ex parte Pfirrmann* (1901) 134 Cal. 143, 145, 66 P. 205.) Citing *Hall v. City of Taft* (1956) 47 Cal.2d 177, 302 P.2d 574, the majority carves out **\*\*\*761** an exception for county regulations governing the use of county property. (Maj. opn., *ante*, 118 Cal.Rptr.2d at pp. 759–60, 44 P.3d at p. 131.) I agree that Los Angeles County is free to manage its property in the City of Pomona without local interference. (*Hall v. City of Taft*, at p. 183, 302 P.2d 574.) Pomona may not, for example, dictate the terms of the county’s leases. But this exception applies only where a county is acting in its capacity as a property owner. (*Ibid.*) The exception does not permit a county to enact police power regulations governing the use of its property by independent parties to whom it has leased the property, because when the Legislature creates an incorporated city, it delegates that regulatory authority to the city, taking it away from the county. (*In re Knight*, at p. 518, 203 P. 777; *Ex parte Pfirrmann*, at p. 145, 66 P. 205.)

In *Hall v. City of Taft*, for example, the school district—a creature of state law—was acting in its capacity as a property owner by constructing a public building on its property. We said that the school district in that **\*\*133** circumstance was not subject to local building regulations. (*Hall v. City of Taft*, *supra*, 47 Cal.2d at pp. 183–189, 302 P.2d 574.) We expressly distinguished situations in which the district “enact[s] laws for the conduct of the public at large.” (*Id.* at p. 183, 302 P.2d 574.) In that case, the regulatory authority would lie with the city, not the school district.

Los Angeles County, as a property owner, is free to prohibit the sale of firearms on its property. The county, however, has leased the Los Angeles County Fairgrounds to an independent party, and therefore, with respect to that property, it has contractually relinquished its property rights, at least in part. Depending on the terms of the lease, the county may have some control over the uses to which its tenant puts the property, or it may be able to **\*874** amend its lease to prohibit firearm sales. But the county must act in its capacity *as a property owner*. To the extent the county has contractually relinquished its property rights, it may not use its regulatory authority to retain control, because as soon as the county acts in its *regulatory* capacity, it ceases to fall within the exception we recognized in *Hall v. City of Taft*.

When Los Angeles County enacted an ordinance

**Great Western Shows, Inc. v. County of Los Angeles, 27 Cal.4th 853 (2002)**

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prohibiting firearm sales on county property, it was not merely acting as a property owner. Rather, it was attempting to regulate the actions of its tenants, and therefore it was “enacting laws for the conduct of the public at large.” (*Hall v. City of Taji, supra*, 47 Cal.2d at p. 183, 302 P.2d 574.) This it could not do within the City of Pomona.

**Parallel Citations**

27 Cal.4th 853, 44 P.3d 120, 02 Cal. Daily Op. Serv. 3455, 2002 Daily Journal D.A.R. 4367

Accordingly, I dissent.

Footnotes

- <sup>1</sup> Government Code section 53071.5 states: “By the enforcement of this section, the Legislature occupies the whole field of regulation of the manufacture, sale, or possession of imitation firearms, as defined in Section 417.2 of the Penal Code, and that section shall preempt and be exclusive of all regulations relating to the manufacture, sale, or possession of imitation firearms, including regulations governing the manufacture, sale, or possession of BB guns and air rifles described in subdivision (g) of Section 12001 of the Penal Code.”

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**Hodge v. Zoning Hearing Bd. of West Bradford Tp., 11 Pa.Cmwlth. 311 (1973)**

312 A.2d 813

11 Pa.Cmwlth. 311

Commonwealth Court of Pennsylvania.

Robert H. HODGE and Elizabeth W. Hodge, his  
wife, Appellants,  
v.

The ZONING HEARING BOARD OF WEST  
BRADFORD TOWNSHIP, Appellees.

Argued Oct. 3, 1973. | Decided Nov. 29, 1973.

Mobile home park owners sought to expand their park and were denied permission by the zoning board. The Court of Common Pleas, Chester County, D. T. Marrone, J., upheld the zoning board and mobile home park owners appealed. The Commonwealth Court, No. 235 C.D.1973, Blatt, J., held that challenge to the zoning ordinance on the basis of procedural irregularities in its adoption was not timely; that the mobile home park in existence did not constitute a nonconforming use such as would have given the owners a right to continue the natural expansion of the park; that it was not an abuse of discretion to limit mobile home parks to districts zoned commercially; that where there was one mobile home park in existence and other land zoned commercially, there was no exclusionary zoning from the fact that only 2 1/2 percent of the township was zoned commercially; and that the zoning ordinance was not an invalid special legislation aimed at halting the natural development of the existing mobile home park.

Affirmed.

Kramer, J., dissented and filed opinion.

West Headnotes (13)

- <sup>[1]</sup> **Zoning and Planning**  
- - Enlargement or Extension of Use

Challenge to validity of zoning ordinance based on alleged procedural irregularities in its adoption, which had not been brought before the Court of Common Pleas within 30 days of its adoption, could not be raised before the zoning board on request for expansion of a nonconforming use. 53 P.S. §§ 10101 et seq.,

File:

65741.

1 Cases that cite this headnote

- <sup>[2]</sup> **Zoning and Planning**  
- - Enlargement or Extension of Use

A nonconforming use includes the right of natural expansion so long as that expansion is reasonable and not detrimental to the welfare of the community.

1 Cases that cite this headnote

- <sup>[3]</sup> **Zoning and Planning**  
- - Existence of use in general

Doctrine of nonconforming use does not insure one who engages in a permitted use in one zoning district the right to engage in the same use in an adjoining district where such use is prohibited.

Cases that cite this headnote

- <sup>[4]</sup> **Zoning and Planning**  
- - Existence of use in general

Only physical evidence manifested in the most tangible and palpable form can bring about the application of nonconforming clauses in a zoning ordinance, and before a supposed nonconforming use may be protected, it must exist somewhere outside the property owner's mind.

1 Cases that cite this headnote

- <sup>[5]</sup> **Zoning and Planning**

**Hodge v. Zoning Hearing Bd. of West Bradford Tp., 11 Pa.Cmwlth. 311 (1973)**

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- Existence of use in general

**Zoning and Planning**

- Vested or property rights

Where money expended on facility for a nonconforming use was minimal and where much of the material purchased for the nonconforming use could also be applied to conforming uses, landowner had failed to establish the existence of a nonconforming use or a vested right to use the area for his intended purpose.

Cases that cite this headnote

[6]

**Zoning and Planning**

- Enlargement or Extension of Use

Where mobile home park in existence at the time of adoption of a zoning ordinance conformed to that ordinance at the time of its adoption or shortly thereafter, landowner had not established a nonconforming use such as would allow him to expand the mobile home park into areas where it would be a nonconforming use.

Cases that cite this headnote

[7]

**Zoning and Planning**

- Construction, Operation, and Effect

The nomenclature of the district to which a use is restricted is of no consequence where it clearly does not result in grouping such use with totally incompatible uses, thus rendering the districts concerned unusable for the purpose.

2 Cases that cite this headnote

[8]

**Zoning and Planning**

- Mobile homes; trailer parks

It was not an abuse of discretion for township to

restrict mobile home parks to districts zoned commercial.

1 Cases that cite this headnote

[9]

**Zoning and Planning**

- Public health, safety, morals, or general welfare

Zoning ordinance which totally excludes legitimate uses or fails to provide for such uses anywhere within the municipality should be regarded with particular circumspection and in fact must bear a more substantial relationship to the public health, safety, morals and general welfare of the community than an ordinance which merely confines that use to a certain area in the municipality.

1 Cases that cite this headnote

[10]

**Zoning and Planning**

- Validity of regulations in general

**Zoning and Planning**

- Regulations in general

Presumption of the validity of a zoning ordinance can be overcome by establishing that such ordinance totally excludes a legitimate use from the community, and thereafter it is the responsibility of a municipality to establish the validity of a total ban, but where a challenger alleges that there is de facto exclusionary zoning, challenger carries the heavy burden of showing that the ordinance, as applied, effectively prohibits such use.

5 Cases that cite this headnote

[11]

**Zoning and Planning**

- Mobile homes; trailer parks

Where at least one mobile home permitted by zoning ordinance was already in existence, and

where there was other undeveloped land zoned for mobile home parks, fact that only 2½ percent of a township was zoned for mobile homes and that 1 percent to 1½ percent of that amount was already developed did not establish a de facto exclusionary zoning.

2 Cases that cite this headnote

1121

**Zoning and Planning**

- Mobile homes; trailer parks

Zoning ordinance is not exclusionary merely because the areas zoned for mobile home parks are small and already occupied by existing mobile home parks.

1 Cases that cite this headnote

1131

**Zoning and Planning**

- Mobile homes; trailer parks

Zoning ordinance which limited growth of one mobile home park but which also provided other land on which other mobile home parks could be developed did not constitute invalid special legislation aimed at halting the natural development of the existing mobile home park.

1 Cases that cite this headnote

**Attorneys and Law Firms**

**\*313 \*\*815** William H. Mitman, West Chester, for appellants.

Agulnick & Talierco, Ronald M. Agulnick, West Chester, Glenvar E. Harman, Downingtown, for appellees.

Before BOWMAN, President Judge, and CRUMLISH, Jr., KRAMER, WILKINSON, MENCER and BLATT, JJ.

**OPINION**

BLATT, Judge.

Robert H. and Elizabeth W. Hodge are the owners of a large tract of land located in West Bradford Township (Township). The property is bisected by the Thorndale-Marshallton Road, with approximately 137 acres lying on the east side of the road and approximately 188 acres on the west side of the road. Since acquiring the land in 1957, the Hodges have used it primarily as a commercial orchard, but beginning in 1966, they also began installing mobile homes, eventually establishing a mobile home park known as 'Appleville', which included mobile homes located on both sides of the Thorndale-Marshallton Road.

**\*314** When the Hodges first began placing mobile homes in Appleville, the Township had no zoning ordinance, but a comprehensive plan was adopted on August 12, 1969, and, on April 14, 1970, following public hearings, a zoning ordinance was also adopted (to be effective April 19, 1970). This ordinance permitted mobile home parks in commercial districts only, and then by special exception. The Hodges' land was zoned partially residential and partially commercial, with part of Appleville being within a residential district. On March 9, 1971, the Township's zoning map was amended so as to include all of Appleville in a commercial district, with the establishment of commercial districts of approximately 20 acres on each side of the road.

Subsequent to the enactment of the April 14, 1970 ordinance, the Hodges sought a special exception from the Zoning Hearing Board (Board) for Appleville. The Board granted an exception, finding that there were then five mobile homes on the west side of the road, all conforming with the ordinance, and fifty-four homes on the east side of the road, some conforming and some nonconforming. On appeal to the Court of Common Pleas of Chester County (No. 60, February Term, 1971), the Board's decision was affirmed, and no appeal was ever taken from that order.

On December 5, 1970, the Hodges filed an application with the Township Zoning Officer for permission to install 300 mobile homes on the west side of the Thorndale-Marshallton Road. The application was refused on the same day on the grounds that it did not conform to the zoning ordinance. The Hodges then appealed to the Board, numerous hearings were held between December 29, 1970 and August 19, 1971, and on October 2, 1971, and Board **\*\*816** rejected the application, finding that the

proposed additional mobile homes would be placed largely in a residential district where mobile home parks were not permitted. It also found **\*315** that, despite the Hodges' contentions to the contrary, this proposal did not constitute the expansion of a nonconforming use. The Board held that the park on the west side of the road, where the additional mobile homes were to be placed, was a conforming use, and that, since March 14, 1971, so was the entire park on the east side of the road. Additionally, the Board found that the Hodges had made no substantial outlay of funds on the proposed additional spaces prior to the effective date of the zoning ordinance. The Court of Common Pleas of Chester County, without taking any additional testimony, affirmed the Board's order.

Our scope of review where, as here, the court below took no additional evidence, is limited to a determination of whether or not the Board abused its discretion or committed on error of law. *Philadelphia v. Earl Scheib Realty Corp.*, 8 Pa.Cmwlth. 11, 301 A.2d 423 (1973). The Hodges have raised a number of questions concerning the action of the Board as well as the validity of the Township's zoning ordinance, and we will attempt to deal with each of these questions individually.

#### **PROCEDURAL IRREGULARITIES**

<sup>[1]</sup> The Hodges have challenged the validity of both the Township's comprehensive plan and its zoning ordinance because of alleged procedural irregularities in their adoption. We must note, however, that this challenge was raised before the Board rather than in an action brought before the Court of Common Pleas within 30 days of the adoption of the ordinance, and it was, therefore, not properly raised. *Gerstley v. Cheltenham Township Commissioners*, 7 Pa.Cmwlth. 409, 299 A.2d 657 (1973); *Linda Development Corp. v. Plymouth Township*, 3 Pa.Cmwlth. 334, 281 A.2d 784 (1971). Our Supreme Court has stated, in **\*316** *Roeder v. Hatfield Borough Council*, 439 Pa. 241, 246, 266 A.2d 691, 694 (1970):

'As to testing defects in the process of enactment of an ordinance by a borough, the MPC, s 915,<sup>1</sup> states that these issues may be raised in a proceeding before the Board only within 30 days of the effective date of the ordinance. Even though the MPC thus creates a statute of limitations, it does not create a formal procedure by which such questions may be raised. As s 910 explicitly states that the Board has no power to pass on the validity of an ordinance and as such

questions will rarely involve issues within the special competence of the Board, issues concerning the process of enactment should be brought before the court of common pleas (formerly the Court of Quarter Sessions) within 30 days of the date of enactment pursuant to s 1010 of the Borough Code.'

The proper procedure here would have been for the Hodges to bring an action, pursuant to Section 702 of The Second Class Township Code, Act of May, 1, 1933, P.L. 103, 53 P.S. s 65741, in the Court of Common Pleas within 30 days of the effective date of the ordinance. Since they did not do so this matter is not properly before us and it need not be considered.

#### **EXPANSION OF A NONCONFORMING USE**

<sup>[2]</sup> The Hodges contend that they have established a mobile home park as a nonconforming use on their property and are entitled to expand that use by adding 300 **\*\*817** mobile homes, and it is generally true that a nonconforming use includes the right of natural expansion so long as that expansion is reasonable and not detrimental to the welfare of the community. **\*317** *Township of Lower Yoder v. Lester J. Weinzierl*, 2 Pa.Cmwlth. 289, 276 A.2d 579 (1971). 'Structures may be erected on open land previously devoted to a nonconforming use, as of right. However, the erection of structures upon land not previously so used, may only be accomplished by way of variance, the requisites of which are hardship to the owner and absence of detriment to the public interest.' *Philadelphia v. Angelone*, 3 Pa.Cmwlth. 119, 128 A.2d 672, 677 (1971).

<sup>[3]</sup> <sup>[4]</sup> The question in this case, however, is whether or not a nonconforming use actually did exist, or if in fact the original construction in Appleville constituted a use compatible with the terms of the zoning ordinance. It would be specious to contend that the doctrine of nonconforming use ensures one who engages in a permitted use in one zoning district the right to engage in the same use in an adjoining district where such use is prohibited. *Colonial Park for Mobile Homes, Inc. v. Zoning Hearing Board*, 5 Pa.Cmwlth. 594, 290 A.2d 719 (1972). Moreover, in determining whether or not a nonconforming use existed, '(o)nly physical evidence manifested in the most tangible and palpable form can bring about the application of nonconforming clauses in a

zoning ordinance. Before a supposed nonconforming use may be protected, it must exist somewhere outside the property owner's mind.' *Cook v. Bensalem Township Zoning Board of Adjustment*, 413 Pa. 175, 179, 196 A.2d 327, 330 (1964).

<sup>151</sup> As found by the Board (and by the lower court in the unappealed decision at No. 60, February Term, 1971), and as supported by substantial evidence in the record, the Hodges' mobile home park on the west side of the road, where the planned expansion is to take place, was in conformance with the zoning ordinance as of the date of its enactment. On the east side of the road, where apparently no expansion is presently planned, part of the mobile home park was in conformance \*318 as of the date of enactment of the ordinance and the entire park was in conformance following the amendment of the ordinance on March 14, 1971. It is true that some physical activities were begun on the proposed 300 sites prior to the enactment of the zoning ordinance, but these were hardly sufficient to establish that the additional area concerned was now subject to a nonconforming use. And, although there was planning for the 300 proposed sites, the money expended on facilities was minimal. In fact, much of the material that was purchased could be applied to conforming uses or to the existing mobile home park. If anything, the monies so expended for such activities seem to have been spent in a 'race' to beat the effective date of the zoning ordinance, which is not a permissible action in establishing a nonconforming use. *Penn Township v. Fratto*, 430 Pa. 487, 244 A.2d 39 (1968); *Penn Township v. Yecko Bros.*, 420 Pa. 386, 217 A.2d 171 (1966). For similar reasons, there would be no basis for a finding that the Hodges had a vested right to use the area in question as a mobile home park. See *Clover Hill Farms, Inc. v. Lehigh Township*, 5 Pa.Cmwlth. 239, 289 A.2d 778 (1972); *Friendship Builders, Inc. v. West Brandywine Township Zoning Hearing Board*, 1 Pa.Cmwlth. 25, 271 A.2d 511 (1970).

<sup>161</sup> We must agree with the Board and the lower court, therefore, that the Hodges had not established a mobile home park as a nonconforming use, and that, because their mobile home park does in fact conform to the dictates of the zoning ordinance, there is no right of expansion available to them now.

Because of this holding, therefore, we need not decide their challenge to the validity of Section 1000(b) of the Township \*\*818 zoning ordinance, which limits the expansion of a nonconforming use to 50%.

### **\*319 VALIDITY OF THE ZONING ORDINANCE**

The Hodges have raised some challenges to the substantive validity of the zoning ordinance, at least as it applies to mobile home parks. It is clear that, in considering the validity of this ordinance, we must presume it to be valid and constitutional, the burden of proving otherwise being upon the Hodges. See *Schubach v. Silver*, 9 Pa.Cmwlth. 152, 305 A.2d 896 (1973).

<sup>171</sup> <sup>181</sup> They contend that it was improper to confine mobile home parks to commercial districts, and that such parks should be permitted in residential districts as well (individual mobile homes are permitted in residential districts). Such a restriction, however, has clearly been held to be valid<sup>2</sup> and we see no reason now to change that position. The nomenclature of the district to which a use is restricted is of no consequence where, as here, it clearly does not result in grouping such use with totally incompatible uses and thus rendering the districts concerned unusable for the proposed use. A mobile home park unlike individual mobile homes, is often a commercial as well as a residential development, and it requires specific regulations by the municipality. It is hardly improper or discriminatory to place reasonable restrictions on such a development, including placing it in other than purely residential districts. At any rate, this is a decision for the local legislative body to make and we cannot find that the Township here abused its discretion in so doing.

<sup>191</sup> <sup>101</sup> The Hodges also contend that this zoning ordinance constitutes a de facto exclusion of mobile home parks because only 2 1/2% Of the Township is zoned for \*320 commercial use and 1% To 1 1/2% Of this amount is already developed.<sup>3</sup> It is true that a zoning ordinance which totally excludes legitimate uses or fails to provide for such uses anywhere within the municipality should be regarded with particular circumspection and in fact must bear a more substantial relationship to the public health, safety, morals and general welfare of the community than an ordinance which merely confines that use to a certain area in the municipality. *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970); *Exton Quarries, Inc. v. Zoning Board of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967). It is also true that the presumption of the validity of a zoning ordinance can be overcome by establishing that such an ordinance does totally exclude a legitimate use from the community, and thereafter it is the responsibility of the municipality to establish the validity of the total ban. *Beaver Gasoline Company v. Osborne Borough*, 445 Pa. 571, 285 A.2d 501 (1971). When, however, a challenger alleges that there is de facto exclusionary zoning, he carries the heavy burden of showing that, even though on its face an ordinance permits a specific use, the ordinance

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as applied effectively prohibits such use.

<sup>111</sup> <sup>121</sup> The facts in this case could in no way support such a finding. Not only does at least one mobile home park which is permitted by the ordinance (the Hodges') already exist, but there is still other undeveloped land in commercial (and industrial) districts in the Township which the Hodges have not established could not be used for mobile home parks. In fact, a zoning ordinance is not exclusionary merely because the areas zoned for mobile home parks are small and already \*321 occupied by existing mobile home parks. Groff Appeal, \*\*819 supra. 'The mere assertion that these areas are small hardly overcomes the presumption of constitutionality.' Honey Brook, supra, 430 Pa. at 621, 243 A.2d at 333.

<sup>131</sup> Lastly, the Hodges contend that the purpose of the Township's zoning ordinance was to halt the natural development of Appleville. Although there evidently was a certain amount of hostility to the Hodges' mobile home park in the Township, we cannot find that the ordinance here constituted invalid special legislation, as was the case in Limekiln Golf Course, Inc. v. Zoning Board of Adjustment of Horsham Township, 1 Pa.Cmwlth. 499, 275 A.2d 896 (1971).

For the above reasons, therefore, we must affirm the order of the lower court.

Footnotes

- <sup>1</sup> The provisions of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, 53 P.S. s 10101 et seq., which are here applicable to not include those amendments added by the Act of June 1, 1972, P.L. --, No. 93.
- <sup>2</sup> Honey Brook Township v. Alenovitz, 430 Pa. 614, 243 A.2d 330 (1968); Appeal of Abraham P. Groff from the Decision of Warwick Township Board of Adjustment, 1 Pa.Cmwlth. 439, 274 A.2d 574 (1971).
- <sup>3</sup> It should be noted that mobile home parks are also permitted in industrial districts, because the zoning ordinances provide that all permissible uses in a commercial district are also permissible in industrial district.

KRAMER, Judge (dissenting).

I respectfully dissent for the same seasons I dissented in Township of Ohio v. Builders Enterprises, Inc., 2 Pa.Cmwlth. 39, 44, 276 A.2d 556, 559 (1971). My reading of the applicable law permits me to conclude that where the record supports the property owner's contention that his Entire property was patently intended to be used for the nonconforming use in Actual use that he should not be required to prove an extension to his nonconforming use but rather only to prove the intended use at the time the Zoning Ordinance or its amendment was passed. This does not mean that the property owner's unannounced intention, or what may have been in the mind of the property owner is controlling, but rather what should be controlling is what the record shows was his patent intention. My reading of the record in this case leads me to believe that this property owner adequately showed his intention to use the entire property for mobile home park purposes; therefore, I would reverse the court below and direct the issuance of a permit.

**Parallel Citations**

312 A.2d 813

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